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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Prior opinions	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	5
District court proceedings	5
The Government's evidence	13
Defense evidence	15
The District Court's opinion and judgment	19
Summary of argument	22
Argument:	
I. Congress contemplated and intended divestiture as the relief for acquisitions illegal under Section 7 of the Clayton Act	29
II. The relief ordered by the court below, by permitting a continuation of du Pont's illegal holding of General Motors stock, the receipt of dividends on that stock, and the voting of that stock by du Pont stockholders, provides an inadequate substitute for divestiture and does not protect the public from the adjudged violation of the Clayton Act	41
III. Divestiture by du Pont of the General Motors stock can be accomplished without undue hardship to the stockholders of either	59
IV. Suggested directions to the district court	80
Conclusion	83

CITATIONS

Cases:	
Aluminum Co. of Am. v. *F.T.C.*, 284 Fed. 401, certiorari denied, 261 U.S. 616	32
American Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 152 F. Supp. 387	39
American Crystal Sugar Co. v. *The Cuban-American Sugar Co.*, 524 F. 2d 524	40

575748—60——1

Cases—Continued

	Page
American Trucking Associations v. *United States*, 355 U.S. 141	30
American Trucking Associations v. *United States*, 364 U.S. 1	31
Appalachian Coals, Inc. v. *United States*, 288 U.S. 344	29
Arrow-Hart & Hegeman Electric Co. v. *F.T.C.*, 291 U.S. 287	32, 33
Continental Insurance Co. v. *United States*, 259 U.S. 156	25, 49, 50, 52, 53
Crown Zellerbach Corp., CCH Trade Reg. Rep. (1957–1958) ¶ 68,923	33
F.T.C. v. *Western Meat Co.*, 272 U.S. 554	31, 32
Harriman v. *Northern Securities Co.*, 197 U.S. 244	36, 79
Hartford-Empire Co. v. *United States*, 323 U.S. 386	43
Hughes v. *United States*, 342 U.S. 353	55
International Boxing Club v. *United States*, 358 U.S. 242	26, 36, 56
International Salt Co. v. *United States*, 332 U.S. 392	43
International Shoe Co. v. *F.T.C.*, 280 U.S. 291	33
In the Matter of H. M. Byllesby & Company, 6 S.E.C. 639	25, 48
In the Matter of International Paper and Power Company, 2 S.E.C. 274	48
In the Matter of Manchester Gas Company, 7 S.E.C. 57	25, 49
In the Matter of Union Bag & Paper Corp., 52 F.T.C. 1278	33
In the Matter of the United Corporation, 13 S.E.C. 854	25, 48
In the Matter of Vanadium-Alloys Steel Co., 18 F.T.C. 194	33
McCray v. *United States*, 195 U.S. 27	60
Nigro v. *United States*, 276 U.S. 332	60
North American Co. v. *S.E.C.*, 327 U.S. 686	45
Northern Securities Co. v. *United States*, 193 U.S. 197	35, 36, 79, 82
Sonzinsky v. *United States*, 300 U.S. 506	60
Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U.S. 346	29
Standard Oil Co. v. *United States*, 221 U.S. 1	36, 41, 79, 83
Standard Oil Co. v. *United States*, 337 U.S. 293	29
Swift & Co. v. *F.T.C.*, 272 U.S. 554	33
Temple Anthracite Co. v. *F.T.C.*, 51 F. 2d 656	33

Cases—Continued

	Page
Thatcher Mfg. Co. v. *F.T.C.*, 272 U.S. 554	32
United States v. *Aluminum Co. of America*, 91 F. Supp. 333	55
United States v. *American Tobacco Co.*, 221 U.S. 106	41, 80
United States v. *Constantine*, 296 U.S. 287	60
United States v. *Crescent Amusement Co.*, 323 U.S. 173	26, 36, 51, 55, 56, 61
United States v. *Doremus*, 249 U.S. 86	60
United States v. *du Pont & Co.*, 353 U.S. 586	5, 29, 42, 44, 46
United States v. *du Pont*, 126 F. Supp. 235	6, 8, 44
United States v. *Kahriger*, 345 U.S. 22	60
United States v. *Lehigh Valley R.R. Co.*, 254 U.S. 255	36, 57, 83
United States v. *New England Fish Exchange*, 258 Fed. 732, 292 Fed. 511	39
United States v. *Paramount Pictures, Inc.*, 334 U.S. 131	54
United States v. *Reading Co.*, 253 U.S. 26, 259 U.S. 156	36, 49, 57, 82
United States v. *Reading Co.*, 226 U.S. 324	82
United States v. *Sanchez*, 340 U.S. 42	60
United States v. *Union Pacific R.R. Co.*, 226 U.S. 61	36, 53, 57, 82
United States v. *Union Pacific R.R. Co.*, 226 U.S. 470	25, 57
United States v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, affirmed, 347 U.S. 521	81
United States v. *U.S. Gypsum Co.*, 340 U.S. 76	43
Veazie Bank v. *Fenno*, 8 Wall. 533	60
Vivaudou, Inc. v. *F.T.C.*, 54 F. 2d 273	33

Statutes:

Act of October 15, 1914 (commonly known as the Clayton Act), 38 Stat. 730, *et seq.* (15 U.S.C. 12):

Section 2	31, 37
Section 3	31, 37
Section 7	3, 5, 19, 23, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 46, 49, 58, 65
Section 8	22, 31, 33, 37, 38
Section 11	3, 19, 23, 30, 31, 32, 34, 35, 38
Section 15	5, 19, 23, 30, 34, 35, 36, 37, 38, 39

Statutes—Continued

	Page
Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(7)	28, 61, 63
Sherman Anti-Trust Act, 26 Stat. 209, *et seq.* (15 U.S.C. 1)	29, 36, 38
26 U.S.C. 302(a)	66
26 U.S.C. 311(a)	66
26 U.S.C. 317(b)	66
26 U.S.C. 1033	61
26 U.S.C. 1071	61
26 U.S.C. 1081–3	61
26 U.S.C. 1101–1103	61

Miscellaneous:

25th Annual Report of the Securities and Exchange Commission	63
Berle and Means, *The Modern Corporation and Private Property* (1937), 77–78	47
Blair-Smith and Helfenstein, *A Death Sentence or a New Lease on Life?*, 94 U. of Penn. L. Rev. 148	64
Decrees and Judgments in Civil Federal Anti-Trust Cases	53, 54, 57, 80, 82, 83
H. R. 8126, 86th Cong., 1st Sess	61
H. Rep. 627, 63d Cong. 2d Sess	37, 38
Moody's 1936 *Industrial Manual*	70
Moody's 1960 *Industrial Manual*	68, 71
New York Times, December 10, 1959, p. 59	77
S. 200, 86th Cong., 1st Sess	61
S. Rep. 698, 63d Cong., 2d Sess	37
Treasury Regulations 1.311–1(a)	66

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BRIEF FOR THE UNITED STATES

PRIOR OPINIONS

The opinions of the district court and of this Court on the question of violation of the antitrust laws are reported, respectively, in 126 F. Supp. 235 and 353 U.S. 586. The opinion of the district court on the relief to be granted to terminate the violation of the Clayton Act adjudged by this Court is reported in 177 F. Supp. 1 (R. 3184-3265).

JURISDICTION

The final judgment of this district court, following remand of the cause to it, was entered on November 17, 1959 (R. 3300), and the notice of appeal was filed on January 14, 1960 (R. 3314). This Court noted jurisdiction of the appeal on May 23, 1960 (R. 3317). The jurisdiction of this Court is conferred by § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended.

QUESTIONS PRESENTED

The basic question presented is:

(1) Whether the district court's judgment grants the relief necessary and appropriate to remedy the violation of § 7 of the Clayton Act resulting from E. I. du Pont de Nemours and Company's acquisition and continued ownership of General Motors Corporation stock.

The following questions, which may be subsumed under the foregoing question, are also presented:

(2) Whether the district court misconstrued the Clayton Act by holding that Congress did not thereby intend that divestiture is the remedy to be applied upon determination that there has been a stock acquisition unlawful under § 7 of the Act.

(3) Whether the district court improperly evaluated the factors to be given consideration in determining the relief necessary and appropriate to remedy a violation of § 7.

(4) Whether the district court erred in concluding that there is no method by which du Pont can divest itself of its General Motors stock without undue tax and stock-market consequences.

(5) Whether the district court erred in its conclusions respecting the stock-market consequences of requiring du Pont to divest itself of its General Motors stock.

STATUTE INVOLVED

Section 7 of the Act of October 15, 1914 (commonly known as the Clayton Act), 38 Stat. 731, as originally enacted and in effect at the time the complaint in this case was filed, provided in part as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
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> * * * * * *
>
> This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. * * *

Section 11 of the Act of October 15, 1914, 38 Stat. 734, as originally enacted, provided in part as follows:[1]

[1] The quoted portions of the section were not changed in any respect here material prior to the filing of the complaint. The only changes were to amend the first paragraph to give jurisdiction to the Federal Communications Commission as to common carriers engaged in wire or radio communication, and to the Civil Aeronautics Board as to air carriers subject to regulation by that Board (15 U.S.C. 21).

Authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * *

Section 15 of the Act of October 15, 1914, 38 Stat. 736, as originally enacted and in effect at the time the complaint was filed, provided in part as follows:

> The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This case was initiated by the filing of a complaint in June, 1949, charging the defendants with violating Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In December, 1954, the district court, after trial, entered a judgment dismissing the complaint. On appeal, this Court held that du Pont's acquisition and subsequent retention of 23% of General Motors common stock violated Section 7 of the Clayton Act, and, in view of this determination, did not render a decision on the Sherman Act charges. *United States* v. *du Pont & Co.*, 353 U.S. 586. The Court remanded the cause to the district court to determine the relief necessary and appropriate to terminate the Clayton Act violation.

DISTRICT COURT PROCEEDINGS

This Court's judgment was filed in the district court on July 18, 1957 (R. 2), and on September 25, 1957, a pre-trial conference was held to discuss the procedure to be followed on remand (R. 3–4). The

court observed that its determination respecting relief could have "far-reaching consequences" on the market value of du Pont and General Motors stock, and that it had therefore decided to appoint *amici curiae* to protect the interests of the stockholders of these corporations (R. 4).[2] Their duties, as the court defined them, were to offer plans, study the plans proposed by the litigants, and make recommendations (*ibid.*). The court also urged counsel to formulate judgment proposals which would safeguard the public interest "in a manner least disturbing to the economy, and least harmful to the litigants and to the stockholders of the corporations involved" (*ibid.*).

The Government stated that in its view the judgment must provide for divestment by du Pont of its General Motors stock and suggested that it would be preferable for du Pont to present its views on how that could be accomplished (R. 5-6). Du Pont opposed that procedure and argued that the Government should first present a specific plan (R. 7). The district court entered an order which directed the Government to file within 30 days "a proposed com-

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[2] By its order of September 25, 1957, it appointed Andrew J. Dallstream to represent the interests of du Pont stockholders and Manuel E. Cowen to represent the interests of General Motors stockholders (R. 10).

The court stated that the *amicus curiae* "should not be partisan" and that "counsel employed by any of the litigants in this case are disqualified to act" (R. 5); but it appointed Andrew J. Dallstream as an *amicus* although he had been one of the defense counsel in the prior district court proceedings, representing certain minor members of the du Pont family who had been named as defendants. See *United States* v. *du Pont*, 126 F. Supp. 235, 236.

prehensive plan of compliance", and provided that "any suggested plan or plans" filed by the defendants and the *amici* be submitted within 60 days thereafter (R. 10–11).

Pursuant to the court's order, the Government on October 25, 1957, submitted a proposed judgment providing the details of a method of divestment (R. 11–17). However, the Government continued to make clear its view that the method of divestment suggested was only one of many acceptable methods of achieving the desired result and that the Government would not oppose reasonable modifications or appropriate alternative plans submitted by du Pont (R. 62–63, 66, 67–68, 287, 3339–3340).

Government counsel stated (R. 821):

> It is not our contention that it is our function to give any particular plan of divestiture.

and at R. 822:

> Our sole position before this court is that this interest, this co-interest between these two companies must be severed, severed finally and severed completely; and if the plan that we have offered today must be amended for the satisfaction of these parties or other interested parties, and the end result is a complete severance of the relations between these two companies, the Government would find any such plan satisfactory.

In the plan which was submitted it was proposed that du Pont divest itself of its 63,000,000 shares of General Motors stock by annually distributing to its

stockholders, as a dividend, 1/10 of this stock (6,300,000 shares) for a period of ten years.[3] Since Christiana Securities Company (Christiana) and Delaware Realty & Investment Corporation (Delaware) own 30% of du Pont's stock and have long been intimately linked with du Pont's management,[4] special provisions governed the stock distributable to these corporations. It was to be sold at public or private sale within a year after each distribution by a trustee to be appointed by the court, who was to remit the net proceeds of sale to Christiana and Delaware. During the 10-year period, 18,483,497 shares of General Motors were thus required to be sold (16,805,684 shares distributable to Christiana and 1,677,813 shares distributable to Delaware, R. 3210–11), or approximately

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[3] Du Pont acquired 3,000,000 of its 63,000,000 shares in 1955 while the legality of its holding was under attack in the present suit. The shares were acquired at a cost of $75,000,000 (1,000,000 shares, later split 3 for 1, at $75 a share) through exercise of rights granted to General Motors stockholders to subscribe for 1 share for each 20 shares held (GX 530–534, R. 2886–90). Before exercising its rights du Pont had been advised that if it decided to sell the rights, the underwriter of the stock offering was prepared to negotiate for "purchase of the entire block" (GX 527, R. 2878).

[4] In the hearing on the merits, the district court found that Christiana and Delaware are holding companies organized by members of the du Pont family; that their holdings of du Pont stock have been "consistently voted as a block always in support of du Pont management"; that Christiana's directors "have in most instances been directors and officers of du Pont"; and that Delaware's officers and directors "have assumed major responsibilities in du Pont management." *United States* v. *du Pont*, 126 F. Supp. 235, 238–239.

1,848,350 shares a year.[6] In addition, the trustee was to sell the 535,500 shares of General Motors stock presently owned by Christiana (R. 13–15).

In order to secure sale of this stock at its "fair value and true worth", the proposed judgment provided that if the trustee believed that he could not sell within the one-year period at prices reflecting such value and worth, he could apply to the court for an order extending the time of sale (R. 15).

Other judgment provisions proposed were: du Pont, Christiana and Delaware were to receive all cash dividends paid on their General Motors stock not yet distributed or sold (R. 13). The right to vote the stock still held by du Pont was to be vested in its stockholders (other than Christiana and Delaware) (R. 15). Du Pont, Christiana and Delaware could acquire no additional General Motors stock, and no officer or director of these defendants could be an officer or director of General Motors (R. 16). Trade relations between du Pont and General Motors were to be subjected to certain limitations and restrictions (R. 15–16).

On the motion of the two *amici*, the court on November 21, 1957, entered an order directing the parties and the *amici* to request a ruling by the Commissioner of Internal Revenue on the income tax con-

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[6] However, at each annual distribution du Pont stockholders were to be given a 15-day option to purchase General Motors stock distributable to Christiana and Delaware at the market price of General Motors stock on the distribution date (R. 14–15). Accordingly, the General Motors shares purchased through exercise of such options would correspondingly reduce the number of shares the trustee was obligated to sell.

sequences of the Government's proposed judgment (R. 18). On May 9, 1958, the Commissioner ruled as follows (ADX 2, R. 3171): The General Motors stock distributed by du Pont would be taxable to its stockholders as dividend income. For du Pont's non-corporate stockholders, the fair market value of General Motors stock on date of distribution would be the measure of the income received. For du Pont's tax-paying corporate stockholders, du Pont's tax basis for its General Motors stock (about $2.09 a share, R. 3187) would be the measure of the income received.[7] On sale by the trustee of stock distributed to Christiana and Delaware, the difference between the cost basis of their General Motors stock (about $2.09 per share) and the net proceeds of sale would be a capital gain taxable at a maximum of 25%. See R. 3176–82.

Du Pont filed a counter proposal on May 14, 1948, under which it would retain all its General Motors stock, but would be barred from voting this stock and would be required to give each of its common stockholders a prorated right to vote du Pont's Gen-

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[6] Exhibits introduced by the Government, du Pont, General Motors, Christiana, and *amicus* Dallstream will be respectively referred to as follows: GX, DX, GMX, CX, ADX.

[7] For these corporate stockholders, only 15% of this income is subject to tax (at the corporate tax rate of 52%), or an effective tax rate of about 7.8% (R. 3187). This rate, applied to $2.09 of income for each share of General Motors received, would result in a nominal tax of about 16.3¢ per share received.

eral Motors stock.[8] Du Pont, Christiana, and Delaware were likewise to be barred from voting General Motors stock, and were to "pass through" voting rights to their respective stockholders substantially on the basis of the du Pont pass through. Du Pont could acquire no additional General Motors stock except stock distributions made by General Motors or stock acquired through exercise of stock subscription rights granted General Motors stockholders. No du Pont officer, director or employee could be at the same time a General Motors officer or employee, nor could he be a director of General Motors except with the approval of the court (R. 21–24).

The judgments proposed by the *amici* substantially paralleled the du Pont proposal, and additionally would have barred any officer or director of du Pont, Christiana or Delaware (including any relative living in the same household) from exercising passed-through voting rights. Under one of them, certain restrictions were to be imposed on du Pont-General Motors trade relations. This proposal also required du Pont to create a new class of common stock to be designated "du Pont Special Common" which would have no rights in du Pont's General Motors stock, and any du Pont common stockholder might,

[8] The prescribed basis for proration was multiplying the number of du Pont shares standing in the stockholder's name by the quotient obtained by dividing du Pont's General Motors holdings by the number of shares of du Pont common stock outstanding. At time of hearing, this quotient would be about 1.38 (du Pont's 63,000,000 General Motors shares divided by 45,731,528 outstanding du Pont shares). See R. 3186; DX51, R. 3057.

with court permission, exchange his du Pont common for a like number of shares of the new Special Common plus the number of General Motors shares allocable to his surrendered du Pont common stock. R. 3189–90.

On September 26, 1958, the Government moved for a preliminary injunction restraining du Pont, Christiana and Delaware from voting General Motors stock, from acquiring additional stock of that company, and from having any officer or director who was also a General Motors officer or director (R. 56). A supporting affidavit stated that all of the proposed judgments submitted to the court provided for the voting and dual-directorship prohibitions which the Government was requesting by way of interim relief; that six members of General Motors Board of Directors were currently du Pont directors; and that these directors had been elected in large part through exercise of voting rights of the stock unlawfully acquired and held by du Pont (R. 57–8). It also urged that, in view of different and sometimes conflicting interests of du Pont and General Motors respecting relief, it seemed appropriate that the views of General Motors be formulated by a management assured of the elimination of du Pont's voting dominance of the company.* The court denied the motion (R. 73).

The taking of evidence with respect to the proposed judgments started February 16, 1959, and ended

*Memorandum on Behalf of the United States in Support of the Government's Proposed Final Judgment, dated September 26, 1958, p. 5. See also R. 3324–6, 3334.

April 9, 1959 (R. 260, 2632, 2639). The court's opinion stating its conclusions as to the relief to be granted was filed on October 2, 1959 (R. 3183). Final judgment was entered on November 17, 1959 (R. 3300).

THE GOVERNMENT'S EVIDENCE

The Government presented evidence to show that the proposed stock divestiture could be effectuated without serious injury to the property interests of the defendants or their stockholders. At this point we merely outline the main aspects of this evidence, parts of which will be stated in more detail later (see *infra*, pp. 75–78).

There was substantially undisputed evidence introduced by the Government that the stock market is capable of absorbing large blocks of common stock both in terms of absolute dollar amounts and in terms of the proportion of the issuer's total outstanding stock. Its evidence covered every offering of common stock by an industrial or utility corporation during the period 1951–1957 where the subscription price had totaled $25,000,000 or more (GX 618–668; R. 2941–2992). This evidence showed the relationship at various time intervals between the price of the offered stock and that of the market as a whole as reflected by Standard & Poor's industrial or public utility stock index, and it disclosed that the offerings had, on average, relatively little effect on the market price of the offered stock (*ibid.*) The successful offerings included those of General Motors and Ford stock, and other offerings comparable to the trustee's sales

of General Motors stock required by the judgment proposed by the Government.

The Government's evidence also showed an expanding demand for common stocks (including that of General Motors), particularly by institutional investors such as pension funds, investment trusts and insurance companies,[10] and it showed that General Motors itself had an annual demand for over 2,000,000 shares of its common stock (GX 172, R. 2731).

An authority on the securities market[11] testified that the basic long-term influences on stock prices are current and anticipated earnings and dividends; that short-term influences are myriad, and among the most important of these is a temporary distortion in

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[10] R. 357–9, 372–3, 707–9, 761–3, 1021; GX 3, R. 2645; GX 36, 38, R. 2648–9.

Between 1950 and 1957 the assets of non-insured pension funds increased from $5.2 to $19.3 billion and were expected to reach $51 billion by 1965 and the percentage of assets invested in common stocks rose from 16% to 28% and was expected to continue to rise further (R. 706–707, 709). It was estimated that these funds would invest between $300 and $350 million in General Motors stock for the 10 years 1959 to 1968 (R. 763).

During the 1951–1957 period the net purchases of equity securities by investment companies were $3.3 billion (GX 3, R. 2645).

Purchases of common stocks by institutional investors currently approximate $2.5 billion a year (R. 1021).

[11] Dr. Irwin Friend, professor of Economics and Finance at the Wharton School of Finance, director of a number of research projects, consultant to various Government and private organizations, and author of numerous studies relating to the securities market, and formerly Chief of the Business Structure Division, United States Department of Commerce, and Assistant Director, Trading and Exchange Division, Securities and Exchange Commission (R. 986–7).

supply and demand conditions occasioned by the offer of a large block of stock; but that a study of all sizable offerings of common stock made during a long period by industrial corporations indicated that a 10% increase in outstanding supply was accompanied by a temporary price decline, in relation to the market generally, of only about 5% (R. 987–8, 991–3, 1019, 1022–4).[12] He testified that the proportion between the number of shares offered and the total number of shares outstanding was much more important with reference to impact on market price than the absolute dollar volume of the offering (R. 1029). And the Government's plan called for annual sales by the trustee of less than 7/10ths of 1% of the General Motors stock outstanding, or, if du Pont's present holding be excluded, less than 9/10ths of 1% of the remaining outstanding stock.[13]

DEFENSE EVIDENCE

The cornerstone of the defendants' evidence was testimony and exhibits based on a survey made by

[12] The district court evidently failed to observe that the testimony dealt with the effect of an increase in supply occurring within a very short period, at the most a couple of months (R. 1016). The court treated the testimony as inapplicable to the present case because the divestiture called for by the Government's proposal would increase the supply of General Motors stock by 30% (R. 3217), but this 30% increase represents not only the stock required to be sold, but all the stock distributed to du Pont stockholders as well, and covers a period of ten years or more, not an increase occurring within a couple of months.

[13] Outstanding stock, over 282,100,000 shares (GX 691, R. 3007); these shares, less the du Pont holding, over 219,000,000; stock annually to be sold by trustee (R. 3210), about 1,900,000 shares.

National Analysts, Inc., a statistical research organization, covering actual or beneficial owners of du Pont stock subject to the federal income tax imposed on individuals (R. 3205).[14] The purpose of the survey, which used the method of "probability sampling", was to estimate the additional federal income taxes payable by du Pont stockholders if, as provided by the Government's judgment proposal, du Pont distributed to them annually, for a 10-year period, 6,300,000 shares of General Motors stock (*ibid.*).

In compiling the survey data and in making computations therefrom, the stock within its scope was classified according to number of shares owned, as follows: 1–100 shares, 101–200, 201–500, 501–1000, 1001–5000, and over 5,000. From answers to questionnaires submitted to du Pont stockholders, the average maximum federal income tax paid in 1957 by the stockholders falling within each group was estimated. The additional income resulting from distribution of General Motors shares was computed on various assumptions as to the value of these shares when distributed, namely, $14.52, $26.86, $39.20, and $50.81. The total additional federal income taxes payable by du Pont stockholders by reason of the distribution of General Motors shares was then estimated as follows: The number of shares in each grouping was multiplied by the value of the General

[14] This stock comprised 56.4% of du Pont's outstanding common stock (DX 24, R. 3030). The balance of this stock was owned as follows: 29.5% by Christiana and Delaware, 4.2% by other taxable corporations, 5% by non-taxable (charitable, etc.) organizations, and 4.9% by other categories of owners (*ibid.*).

Motors shares (on various assumptions as to value) distributable to these shares. The group's average maximum 1957 income tax rate was applied to this figure, and the sum thus obtained purported to be the probable total additional federal income taxes payable on account of the shares within the group. The sum of the additional federal income taxes shown for each group, as thus estimated, gave a figure purporting to represent the tax impact on du Pont stockholders of the required distribution of General Motors shares. See generally R. 1314–1376; DX 24, R. 3030; DX 25 (not printed [15]).

It is basic to the survey's computation of tax impact that the value of the General Motors shares distributed to du Pont stockholders would represent, in its entirety, additional dividend income to the stockholders. Accordingly, the underlying assumption was that du Pont, throughout the 10-year distribution period, would pay cash dividends in the full amount that it would have paid absent its distributions to its stockholders of General Motors stock—an assumption which, as we show later (*infra*, pp. 67–70), is not necessarily valid since du Pont might, if it desired, adjust its dividends in order to stabilize the tax burden. Other less important assumptions were that the proportion of du Pont's stock falling in each group in 1957, and the average maximum tax rate paid in 1957 by the stockholders in each group, would remain constant throughout the 10-year distribution period

[15] By stipulation, any party may refer to an unprinted portion of the record on appeal (R. 3320–1).

(see R. 1316).[16] Assumptions were also made regarding the manner in which General Motors stock received by trusts would be allocated as between principal and income (R. 1345–6).[17]

Defense witnesses, in predicting that adoption of the Government's judgment proposal would result in a market price for both du Pont stock and General Motors stock substantially below what would otherwise be its market price, gave as a principal factor contributing to this result the additional federal income taxes (as estimated by the National Analysts' survey) payable by du Pont stockholders if this proposal was adopted. See, *e.g.*, R. 1574, 2073–4. Testimony was given that many non-corporate owners of du Pont stock would find it advantageous to sell their du Pont holdings and pay the maximum 25% capital gains tax rather than pay ordinary income tax rates (running as high as 91%) on additional income received because of General Motors stock distributions, and that, on the buying side, demand would be restricted because purchase of du Pont would be buying into a tax problem (R. 1527–31, 1534–6, 2086–7, 2089). Likewise, there was testimony that certain du Pont stockholders, wishing to keep du Pont stock notwithstanding additional income tax liability resulting from

[16] Since usable questionnaires were not received from stockholders owning approximately one-third of the shares within the scope of the sample survey, various assumptions were made as to the classification and tax brackets of non-responding stockholders (R. 1362–8).

[17] According to the survey's estimate, stock held by trusts constitutes 23.6% of the total beneficial ownership of du Pont common stock (DX 24, R. 3030).

distributions of General Motors stock, would sell all or part of the General Motors stock received in order to provide funds to pay the additional tax attributable to receipt of this stock, and that sales so generated would tend to depress market price (R. 1485–92, 2073–4).

THE DISTRICT COURT'S OPINION AND JUDGMENT

The district court stated that its responsibility was to frame a judgment which would eliminate the effects offensive to the statute of du Pont's acquisition of General Motors stock, but that, in making a choice among remedial measures, it should take into account "the interests of hundreds of thousands of persons" who are stockholders of the defendant corporations (R. 3196). The court repeated what it had said at the outset of the hearing, that the "primary" problem to be resolved was promulgation of a judgment remedying the statutory violation "without penalizing those [stockholders] who may become the innocent victims of this case", and that "the big problem here" is to redress a violation of law "without punishing innocent people" (R. 3197).

The court rejected the Government's contention that divestiture is, under the statute, the proper remedy for stock acquired and held in violation of Section 7 of the Clayton Act. It held that, irrespective of whether Section 11 of the Act makes divestiture mandatory when the proceeding to enforce Section 7 is brought by the Federal Trade Commission under Section 11, when the proceeding to enforce is brought by the United States pursuant to Section 15 of the

Act, a court having jurisdiction of such action has unrestricted discretion to determine the nature of the relief to be granted and may therefore properly deny divestiture relief. See R. 3200–3.

The opinion summarized the judgments proposed by the United States, by du Pont, and by the *amici* (R. 3185–90). It also dealt at length with the evidence introduced by the parties (R. 3212–34). The tax impact of the Government's divestiture plan on individuals and trusts owning du Pont stock was characterized as "crushing", "grossly unfair", "shocking", "staggering", "extraordinarily severe", equivalent to a "'capital levy'', "enormous" (R. 3204, 3210, 3211, 3247, 3263).[18] As to the effect of the plan on the market value of du Pont and General Motors stock, the court said that the extent of the adverse consequences "cannot be measured with any degree of certainty", but that it was satisfied that they would

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[18] For du Pont stockholders in the 1–100 share group, estimated by National Analysis as constituting 80% of the stockholders who are individuals or individual trust beneficiaries (DX 24, R. 3030), the tax impact of the Government's judgment proposal would be "very low" (R. 1486). Sumner Emerson, a principal defense witness, testified that on the average a person in this stockholder group would be in the 30% income tax bracket, would have an income ranging from $16,000 to $20,000, and would, under the Government's judgment proposal, pay an additional tax of less than $50 a year (R. 1488).

Of course, the greatest tax impact of the proposal would be on individuals who own directly or beneficially over 5,000 du Pont shares, who have an average income tax rate of about 80% and a probable income of $160,000 to $180,000 a year (R. 1487). There are, however, only 404 such stockholders, less than ⅛ of 1% of du Pont individual or individual-trust-beneficiary stockholders (DX 24, R. 3030).

be "substantial" and "very serious" (R. 3247). The Government's proposed judgment was declared to be "unnecessarily harsh and punitive" (R. 3263). The court stated its belief that divestiture of du Pont's General Motors stock could not be achieved by any method "which would not either impair the value of the property interests involved or impose severe tax consequences upon the stockholders of the du Pont Company" (R. 3249).

The court's ultimate conclusion was that the judgment proposed by du Pont, supplemented in certain respects, would provide adequate and effective relief against future violation of Section 7 (R. 3263–4). The judgment determined to be appropriate was outlined in the opinion (R. 3264–5) and put into effect by the judgment actually entered (R. 3300–12). Its main features are:

Du Pont and Christiana may retain their present General Motors stock. They may not acquire additional stock except stock acquired by virtue of stock dividends declared by General Motors or in the exercise of stock subscription rights given by it. Du Pont, Christiana and Delaware and their officers and directors (and resident family members of the latter) are barred from voting General Motors stock. Du Pont shall pass through pro rata to its stockholders the right to vote its General Motors stock. A monitor appointed by the court shall observe and report on the pass through of du Pont's voting rights. Certain restrictions are imposed on du Pont-General Motors trade relations. Du Pont, Christiana and Delaware

may not have any officer or director who is an officer or director of General Motors. They and their officers and directors may not nominate any person for election as a General Motors director, and may not propose any person as a General Motors officer. If legislation should be enacted which would substantially alter the tax consequences to du Pont stockholders of distribution to them of General Motors stock or if the judgment should prove inadequate to remedy the Clayton Act violation, any party may apply to the court for modification of the judgment in the light of the then existing circumstances.

SUMMARY OF ARGUMENT

I

Congress, enacted the Clayton Act to supplement the Sherman Act by specifying particular acts as anti-trust violations. It provided for civil remedies only, either through injunctive proceedings by the Department of Justice or administrative action principally by the Federal Trade Commission. Whichever procedural course is followed, the dominant consideration bearing on relief is that Congress intended enforcement to take the form of undoing the acts determined to be unlawful. When the violation is interlocking directors under Section 8, the relief is not to order the directors to perform their duties as though they had no conflict of interests, but to terminate the dual directorships. So here, where the illegal activity is the acquisition of stock, the relief contemplated is the divestiture of the illegal holding, not some lesser step which will suppress the immediate symptoms without

curing the underlying illness which, so long as it persists, may produce new symptoms no less prohibited by law.

While the language of Section 15, *supra*, p. 5, to "prevent and restrain" violations, is in general terms, Section 7 would seem reasonably to imply that illegal relationships are to be terminated by divestment. The generality of the section is given meaning by the language of Section 11, authorizing enforcement by the Federal Trade Commission and specifying divestment as the remedy. It has been the established practice of the Federal Trade Commission operating under this section to require divestiture and, in fact, the courts have held that divestiture is not only a remedy which the Commission has the duty to apply, but that it is the only one which it is authorized to grant. *Arrow-Hart & Hegeman Electric Co.* v. *F.T.C.*, 291 U.S. 587. Since there is no apparent reason why Congress should have wished that, dealing with the same evil, relief under the two sections should be different, the explicit provisions of Section 11 buttress the view that Section 15 contemplates the same remedy.

The court below rejected our argument that under the Act divestiture is not only contemplated but is mandatory. But even if there are exceptional cases where some other remedy is justified, certainly the Act indicates that divestiture is the normal remedy, to be rejected only for compelling and extraordinary reasons. In order to justify some lesser step, it must appear that there is some necessity for abandoning divestment and real assurance that the substitute rem-

edy will effectively eliminate the violation and safeguard the public, whose interest must come first in evaluating proposals for relief.

II

The relief ordered by the court below is inadequate to protect the public against the adjudged violations of the Clayton Act. The violation consisted of an acquisition of General Motors stock by du Pont which may have the effect of lessening competition, restraining commerce or creating a monopoly. Appropriate relief must protect the public from all of these possible antitrust violations resulting not only from the specific relationships on the basis of which the Court found the violation, but also from the innumerable other activities of the two companies with each other and with other companies in the chemical and automotive industries.

The court's decree would leave du Pont with its General Motors investment with a market value of 2½ to 3⅛ billion dollars, from which it regularly realizes nearly one third of its annual income. This continuing financial interest is so great that du Pont, unless it is to be derelict in its obligations to its own stockholders, must continue to be concerned with the affairs of General Motors; and General Motors can hardly ignore that concern when some 20% of its stock will be voted by du Pont stockholders for an indefinite period in the future. Du Pont's influence will not be directly exercised by interlocking officers and directors or by direct casting of votes at annual meetings, but the community of interest will continue

to be felt not only by the overhanging weight of such a huge investment but directly through the votes of du Pont stockholders, who, under the decree as now, will continue to have a dual interest, in both du Pont and General Motors—and for whom it would be true that what would be good for General Motors would be largely significant only to the extent that it was also good for du Pont. Similarly, the du Pont management could not be unaware that what might be bad for General Motors would be regarded by du Pont stockholders as bad for them. In cases under the Sherman Act, the court has ordered the divestment of controlling stock and then gone further to prohibit stockholders of an antitrust violator from voting the stock so long as they continue to be interested in both corporations. *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 470; *Continental Insurance Co.* v. *United States*, 259 U.S. 156.

The Securities and Exchange Commission, which has a special competence in such matters, has repeatedly held that, under its statutes, control is not terminated solely by the relinquishment of voting rights. *In the Matter of H. M. Byllesby & Company*, 6 S.E.C. 639; *In the Matter of the United Corporation*, 13 S.E.C. 854; *In the Matter of Manchester Gas Company*, 7 S.E.C. 57.

The district court itself seems to have been acutely aware that transfer of the voting power in General Motors to the du Pont stockholders was not wholly effective, for it sought to buttress that relief by providing an injunction against preferential dealings. Desirable as this may be, it is not getting at the core of the violation, but dealing only with external

symptoms. In *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, this Court recognized that injunctive relief of this type does not take the place of divestiture.

While we do not believe that divestiture will result in the financial losses to the du Pont and General Motors stockholders which the appellees predict, we point out that the primary duty of the court was to protect the public by providing effective relief, rather than to protect the stockholders from any incidental losses which might result from divestiture. *International Boxing Club* v. *United States*, 358 U.S. 242. It was the duty of the district court to put first things first, and the first thing here was protection of the public, not the stockholders.

III

A decree requiring divestiture by du Pont of the General Motors stock is entirely feasible and will not cause undue financial losses to the stockholders of the two companies. While this assertion appears to be contradicted by the detailed findings of the district court, those findings are based on mistaken assumptions which deprive them of the weight ordinarily to be accorded such determinations.

In the first place, it was inappropriate for the court to consider as a factor, and to attach so much weight to, the tax liabilities which would result from divestiture. Taxes are not assessed as a penalty, but are imposed by Congress in an attempt to distribute the cost of government among the citizenry. The burden of taxation, no matter how heavy it rests, cannot be

considered as in any sense punitive. Who shall pay taxes and how much is a question of legislative judgment. While the appellees cannot question this as a general matter, they assert that when transfers of securities are required by legislative fiat or court decree, the taxpayers, having no choice, are hurt by the imposition of taxes which, had they been free not to make the transaction, they would not have incurred. But even here the matter of whether such a tax burden shall be imposed is a question for Congress, which has in the past taken special recognition of involuntary conversions, and sales forced in order to comply with other federal laws such as the Public Utility Holding Company Act. Actually Congress has been considering tax relief for forced distributions under the antitrust laws. It is a proper issue for Congress, but not for the judiciary whose duty of entering decrees for the protection of the public cannot be shirked in an effort to minimize the tax burden on private interests.

As to market disruption, in spite of the court's findings to the contrary, it cannot be disputed that comparable distributions have been made in the past, not only without injury but with ultimate gains to the stockholders. Whatever plan is ultimately adopted should provide for an orderly process of distribution with time enough to avoid flooding the market with more shares that it can absorb. Once this is done, there is every reason to believe that no losses need result. The fallacy in the district court's reasoning was that it accepted the appellees' evidence limited to the plan submitted by the Government, and then

went no further. But the issue is not whether the particular scheme for divestment was sound, but whether *any* divestment plan can be worked out which will produce the desired results without unfair hardships.

We suggest that this end can perhaps be best achieved by merely ordering du Pont to divest its entire holding ratably over a stated period, i.e., ten years, leaving to du Pont the option to divest by any method or combination of methods that it deems most practical and advantageous. Thus it could divest each year, wholly or in part, by exchange of General Motors stock for its own outstanding preferred stock and for its own outstanding common stock, by paying part of its annual dividends in General Motors stock, and by outright sale of General Motors stock. Sales could be to General Motors special funds, by private placements, by underwritten offerings to the public, and by sales through brokers on the New York Stock Exchange. If dividends in stock are substituted for part of du Pont's presently customary cash dividends, no increase in taxes of its stockholders will result. To the extent that du Pont utilizes sale to the public as a means of divestment, it will control the timing and method of sale, and there is every indication that sales so controlled and managed will not disrupt market price or involve sacrifice of value. Other distributions under the antitrust laws, as well as under the Public Utility Holding Company Act, have been achieved without loss.

IV

In order to expedite a conclusion to this case, it is urged that the Court provide an incentive to du Pont

to commence distribution by entering an order cutting off voting rights and dividends on the General Motors stock in the event actual divestment is not commenced within one year under a plan consistent with the opinion to be rendered by the Court.

ARGUMENT

I

CONGRESS CONTEMPLATED AND INTENDED DIVESTITURE AS THE RELIEF FOR ACQUISITIONS ILLEGAL UNDER SECTION 7 OF THE CLAYTON ACT

The purpose of the Clayton Act, as stated by this Court on the prior appeal, is to "supplement" the Sherman Act and to arrest "in their incipiency" practices which, if unchecked, are likely to lead to the restraints of trade and monopolization of commerce banned by the Sherman Act. 353 U.S. at 589, 597. The Court has also noted that the prohibitions of the Clayton Act are "specific", "express", and "narrowly directed", and that the Act furnishes "specific tests of its own" for what it condemns. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 355, 356; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 311, 312. The precise delineation of what is prohibited stands in contrast with the broad prohibitions of the Sherman Act, which have "a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360. Also, unlike the Sherman Act, Congress imposed no criminal sanctions for the conduct which it prohibited, and provided for enforcement solely through the medium of civil pro-

ceedings either in the form of district court action instituted by the Department of Justice or by administrative action by the Federal Trade Commission [19] enforced by the courts.

We are here concerned with Section 7 of the Act, which makes it unlawful for a corporation to acquire and hold stock of another corporation where the effect may be to restrain commerce in any section or community, or tend to create a monopoly of any line of commerce. This is one of the "narrowly directed" statutory prohibitions which permits and invites specific relief rather than, as in the Sherman Act, leaving this matter at large.

The language of Section 15, *supra*, p. 5, under which the Government is here seeking relief, is not explicit in prescribing the type of order to be entered; the courts are empowered "to prevent and restrain" violations. Since the violation here is the acquisition of stock, the remedy which the language itself implies is to require the acquisition to be undone, that is, the stock to be disposed of. The generality of this language is given content by the more specific language of Section 11, which spells out explicitly the duty and authority of the Federal Trade Commission. In other words the "underlying policy" of Section 11 serves as a "guiding light" to the appropriate and necessary relief in a Section 15 proceeding. Cf. *American Trucking Associations* v. *United States*, 355 U.S. 141,

[19] The Clayton Act authorizes similar proceedings by the Interstate Commerce Commission, the Federal Reserve Board, and the Civil Aeronautics Board, but, since most of the actual cases have been brought by the Federal Trade Commission, we shall refer to that agency only in order to avoid listing all of them each time the section is mentioned.

149–152; *American Trucking Associations* v. *United States*, 364 U.S. 1, 11.

Section 11 of the Act (*supra*, pp. 3–4) vests in the Federal Trade Commission jurisdiction to enforce compliance with the prohibitions of Sections 2, 3, 7 and 8, and specifies that if the Commission finds that any of the provisions of these sections have been or are being violated, it shall make a written report of its findings as to the facts—

> and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and *divest itself of the stock held* or rid itself of the directors chosen *contrary to the provisions of sections seven* and eight of this Act, if any there be, in the manner and within the time fixed by said order. [Emphasis added.]

Under Section 11, therefore, an order of divestiture has to be entered upon a determination that Section 7 is being violated, and the order "shall" require the offender to "divest itself of the stock held * * * contrary to the provisions of" Section 7. Divestiture relief is thus mandatory by the plain terms of the statute. In addition, this has been the interpretation given it by this Court. In *F.T.C.* v. *Western Meat Co.*, 272 U.S. 554, the Court, in affirming an order of the Commission directed against a violation of Section 7, said (p. 559):

> The order here questioned was entered when respondent actually *held and owned the stock contrary to law.* The Commission's duty was to prevent the *continuance of this unlawful action* by an order directing that it cease and

> desist therefrom and *divest itself* of what it had *no right to hold. Further violations* of the Act through *continued ownership* could be effectively prevented *only* by requiring the owner *wholly to divest itself* of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed. [Emphasis added.]

In *Arrow-Hart & Hegeman Electric Co.* v. *F.T.C.*, 291 U.S. 587, the Court held that divestiture is not only the mandatory remedy in a Commission proceeding to enforce Section 7, but also the only remedy which the Commission is authorized to grant. Section 11, the Court said (pp. 594–595), "specifies *the* remedy which the Commission may apply, *namely*, that it may, after hearing, order the violator to divest itself of the stock held contrary to the terms of the Act" (emphasis added). It further said (p. 598) that in such proceeding the Commission may order divestiture of stock "held in violation of the Act" but is without power to grant other relief even though it may deem other relief "necessary to render effective the prescribed statutory remedy."[20]

The Federal Trade Commission has from the outset required divestiture in contested orders issued in proceedings to enforce Section 7. *Aluminum Co. of Am.* v. *F.T.C.*, 284 Fed. 401 (C.A. 3), certiorari denied, 261 U.S. 616, *F.T.C.* v. *Western Meat Co.*, 272 U.S. 554; *Thatcher Mfg. Co.* v. *F.T.C.*, 272 U.S.

[20] The dissenting opinion likewise stated that the Court's holding was that "as the statute in terms specifies only a single method by which compliance can be compelled—ordering the offender to divest itself of the stock—the Commission can make no other form of order". *Id.* at 600.

554, 560; *Swift & Co.* v. *F.T.C.*, 272 U.S. 554, 561; *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291; *Temple Anthracite Co.* v. *F.T.C.*, 51 F. 2d 656 (C.A. 3); *Vivaudou, Inc.* v. *F.T.C.*, 54 F. 2d 273 (C.A. 2); *Arrow-Hart & Hegeman Elec. Co.* v. *F.T.C.*, 291 U.S. 587;[21] *In the Matter of Vanadium-Alloys Steel Co.*, 18 F.T.C. 194; *Crown Zellerbach Corp.*, CCH Trade Reg. Rep. (1957–1958) ¶ 26,923.

Du Pont has cited *In the Matter of Union Bag & Paper Corp.*, 52 F.T.C. 1278, as an instance in which the Commission did not divest all of the stock acquired. The order was entered by consent without the making of any findings of fact or any adjudication of law violation. 52 F.T.C. at 1278. The complaint charged violation of Section 5 of the Federal Trade Commission Act, Section 8 of the Clayton Act, and Section 7 of that Act. It chiefly attacked a long-term purchase contract, and the stock acquisition alleged (less than 9% of that outstanding) appears to have been incidental to this contract. *Id.* 1282–4. No violation of Section 7 having been found, the fact that the consent order failed to require divestiture of the stock acquired does not mean that the Commission acted upon the assumption that, when stock is held

[21] The order in *Arrow-Hart* is not, as du Pont has implied (Motion to Affirm 10, fn. 7), a departure from the Commission's long-continued practice of ordering divestiture of stock held in violation of Section 7. In that case a holding company had been organized and had acquired all the common stock of two competing companies. The order of the Commission directed, in substance, that the stock of one or the other of the former competitors be divested. Since upon such divestiture the stock not divested would not be illegally held, there was no reason or basis for ordering it to be divested.

in violation of Section 7, the statute gives it freedom to sanction continuation of the unlawful holding of stock."[22]

By Section 11, Congress specified the character of the remedy deemed appropriate and necessary to terminate a Section 7 violation when the enforcing agency is the Federal Trade Commission. It seems unreasonable to assume that Congress intended that the type of relief which it prescribed when the Commission is the enforcing agency was not equally deemed by Congress to be the appropriate and necessary kind of relief when the United States is the enforcing agency. The district court nevertheless concluded that, irrespective of whether the statute makes the remedy of divestiture mandatory in Commission proceedings, this remedy is not mandatory when the enforcement action is brought by the United States (R. 3201–2). The court said that Section 15 of the Clayton Act, which authorizes the United States to bring actions in district courts to "prevent and restrain" violations of the Act, contains no language indicating that Congress "intended to limit the historic equity jurisdiction of the district courts" in determining what relief is necessary and appropriate (R. 3201). The court also believed that legislative history showed that Section 15 "was intended to confer upon the courts the same kind of equitable jurisdiction to enforce the Clayton Act that they possessed and exercised under Section 4 of the Sherman Act in cases arising under that statute" (R. 3201–2).

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[22] As this case illustrates, the terms of a consent order or judgment furnish no reliable indication of the enforcing agency's construction of the statute.

We submit that the court erred in construing Section 15 in isolation from other provisions of the statute, in considering that a prescription of divestiture would be a denial of discretion in formulating requisite relief, and in regarding legislative history as supporting the court's construction of Section 15.

Du Pont's continued holding of General Motors stock has been determined to be a violation of Section 7, and the district court's power and duty under Section 15 is to "prevent and restrain" this violation, just as Section 11 would obligate the Commission, upon a determination that stock was held contrary to the provisions of Section 7, to enter an order to "cease and desist" from the violation. Thus, Sections 11 and 15 equally command that the violation—continuation of an illegal holding of stock—be ended. We submit that the judgment below, which permits retention of illegally held stock and merely limits an attribute of ownership (voting rights), does not "prevent and restrain" the violation. Our view is that the general language of Section 15 must be construed in conjunction with the statute's other provisions, and that Section 11 makes explicit what is implicit in the Section 11 direction for a "cease and desist" order and in the Section 15 direction for a "prevent and restrain" judgment.

To interpret the statute as requiring divestment of illegally held stock accords with the relief which the courts have found to be necessary and appropriate to remedy Sherman Act violations involving stock acquisition as an essential element. See *Northern Securities Co.* v. *United States*, 193 U.S. 197;[23] *Stand-*

[23] The judgment in this case did not directly order stock divestment, but it compelled divestment by prohibiting Northern

ard Oil Co. v. *United States*, 221 U.S. 1, 78–82; *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, 96–98; *United States* v. *Reading Co.*, 253 U.S. 26, 63–64; *United States* v. *Lehigh Valley R.R. Co.*, 254 U.S. 255, 271; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188–191; *International Boxing Club* v. *United States*, 358 U.S. 242, 255–259. Since Congress intentionally patterned Section 15 of the Clayton Act on Section 4 of the Sherman Act, *infra*, p. 38, it follows that Congress must have intended that the type of relief customary under the Sherman Act for violations arising from acquisitions should be used also under the Clayton Act.

Nor is it correct to say that if divestiture relief is mandatory, then in proceedings to enforce Section 7 district courts are deprived of the discretion ordinarily vested in them respecting determination of appropriate and necessary relief. They would still possess and exercise a large measure of discretion as to such important and complex matters as the means and methods for effecting divestiture, the period for its accomplishment, and the need for and nature of interim prohibitions or restrictions pending completion of divestiture.

We also submit that the district court clearly erred in its conclusion concerning legislative history. That

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Securities from voting the acquired stock and by prohibiting payment to it of any dividends on such stock. 193 U.S. at 355–356. In fact, Northern Securities did promptly divest by transferring the acquired stock to its stockholders. See *Harriman* v. *Northern Securities Co.*, 197 U.S. 244, 255–256. And the trial court had assumed when it entered judgment that stock which the judgment "rendered valueless" while held by Northern Securities would be divested. 197 U.S. 244, at 289–290.

history shows the importance of the role Congress intended to give the Federal Trade Commission in enforcement of the Clayton Act, and since, in performing its functions, divestiture was directed, it is logical to believe that Congress intended this remedy to constitute the relief to be accorded in proceedings under Section 15 also.

The basic prohibitions of Sections 2, 3, 7 and 8 of the Clayton Act were in the bill (then Sections 2, 4, 8 and 9) as reported by the House Judiciary Committee and as passed by the House. H. Rep. 627, 63d Cong., 2d Sess., 1–2, 3–4; S. Rep. 698, 63d Cong., 2d Sess., 54–57, 67–69. Each of these prohibitions was made a misdemeanor punishable by fine or imprisonment or both (*ibid.*), and Section 13 (the present Section 15) made it the duty of United States district attorneys, under the direction of the Attorney General, to institute equity proceedings in the several Federal district courts to prevent and restrain violations of the Act (H. Rep., *supra,* at 4; S. Rep., *supra,* at 74). The scheme of enforcement was therefore precisely that of the Sherman Act.

The Senate Judiciary Committee, in reporting the bill with amendments, eliminated the criminal penalties for violation of these sections, declared the conduct which they covered unlawful, and conferred on the Federal Trade Commission authority to "enforce compliance with" their provisions (S. Rep., *supra,* at 42, 48). Concerning the sections which became Sections 2 and 3 of the Act, the report said that "the proposed amendments declare the acts unlawful and provide for the enforcement of the sections through the agency of the Federal Trade Com-

mission, to be created" (*id.* at 42). It said as to the sections which became Sections 7 and 8 of the Act that "enforcement of the sections has been confided by the amendments * * * to the Federal Trade Commission" (*ibid.*). In a separate discussion of what became Section 7, the report said (*id.* at 47):

> Finally, in this section, the penalty provision is stricken out, for reasons heretofore given under section 2, and the enforcement of the section should be confided to the Interstate Commerce Commission, in the case of common carriers, and to the Federal Trade Commission, in the case of other corporations.

The Senate Committee incorporated in the bill a new section (designated Section 9B), basically the same as Section 11 of the Act as passed. The Committee's statement on this section was (*id.* at 48):

> This is also an entirely new provision and is intended to provide the administrative agency through which sections 2, 4, 8, and 9 are to be enforced. It carries its own explanation and is as follows:

The full statement of the Committee's report on Section 13 (Section 15 of the Act) was: "This section which is existing law, is not proposed to be amended in any particular" (*id.* at 50).[24]

Congress adopted the scheme of enforcement embodied in the bill as reported by the Senate Judiciary

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[24] The House Committee's report said that this section is a "reenactment" of Section 4 of the Sherman Act, so as to enable the United States to proceed against corporations for violation of the Act "as it is now authorized by law to proceed against corporations for violations of the Sherman Act" (H. Rep., *supra*, at 21).

Committee, and it did so after this Committee had explicitly stated the nature and intent of its proposed enforcement scheme. The Senate Committee report is therefore to be taken as expressing Congressional purpose and intent.

Du Pont in its motion to affirm cited *United States* v. *New England Fish Exchange*, 258 Fed. 732 (D. Mass.), 292 Fed. 511 (D. Mass.), and *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y.) as inconsistent with our interpretation of Section 15. We believe that, in fact, there is no such inconsistency.

In *New England Fish Exchange* the complaint charged violation of Sections 1 and 2 of the Sherman Act, and only incidentally violation of Section 7 of the Clayton Act. 258 Fed. at 734–735. Bay State Fishing Company, one of many defendants, was held to be a combination in unreasonable restraint of trade which should be dissolved by divestment of the businesses of eight fish dealers which it had acquired. *Id.* at 751. Du Pont apparently relies on the fact that the judgment permitted this defendant to merge assets of one of the dealers so as to acquire a store on a certain pier, but we see no Clayton Act significance in this provision, particularly since the court declared that its judgment banned continued holding of the "stock" of any of the eight dealers. See 292 Fed. at 511, 512.

The *American Crystal Sugar* case was a proceeding under Section 16 of the Clayton Act, 15 U.S.C. 26, which authorizes any person to sue for and have injunctive relief "against threatened loss or damage by a violation of the antitrust laws." The court found

violation of Section 7 of the Act and banned future stock acquisitions, but did not require divestiture of stock already acquired. Irrespective of the merits of this district court decision,[25] at least the relief appropriate to safeguard a private person against injury is not the measure of the relief requisite in a Governmental proceeding brought to vindicate the policy established by Congress in enacting the Section 7 prohibition.

The district court rejected the argument that the statute requires divestiture as the remedy for a violation of Section 7 of the Clayton Act. Even if the court were correct in holding that some measure of discretion remains in the district courts to modify the remedy in appropriate cases, still our argument should not have been rejected in its entirety. If divestiture is not always mandatory, the statute certainly should be interpreted to carry out the Congressional intent that divestiture is the preferred relief. Unless some substituted form of relief is both necessary and equally effective, a court is not justified in accepting a makeshift device instead of making a clean break with the past. In the succeeding portions of this brief we point out that the substitute relief ordered by the court below was neither necessary nor adequate to protect the public from the adjudged violation of Section 7 of the Clayton Act.

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[25] Only the defendants appealed from the district court's judgment, so that the failure to require divestiture was not in issue on the appeal. See 259 F. 2d 524 (C.A. 2).

II

THE RELIEF ORDERED BY THE COURT BELOW, BY PERMITTING A CONTINUATION OF DU PONT'S ILLEGAL HOLDING OF GENERAL MOTORS STOCK, THE RECEIPT OF DIVIDENDS ON THAT STOCK, AND THE VOTING OF THAT STOCK BY DU PONT STOCKHOLDERS, PROVIDES AN INADEQUATE SUBSTITUTE FOR DIVESTITURE AND DOES NOT PROTECT THE PUBLIC FROM THE ADJUDGED VIOLATION OF THE CLAYTON ACT

A court's paramount duty in framing an antitrust judgment is to impose prohibitions assuring "complete and efficacious" relief, such as will "neutralize the extension and continually operating force" of the defendant's violation. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185; *Standard Oil Co.* v. *United States*, 221 U.S. 1, 78.

The judgment, by permitting du Pont to retain its General Motors stock, permits a linking in perpetuity of the interests of these industrial giants. Du Pont's continuing interest in the success and profits of General Motors is patent. In the last decade the dividends received by du Pont on its General Motors stock have represented approximately 30% of du Pont's total net income (R. 1717),[26] and there is no

[26] Du Pont's dividends receipts from General Motors have represented a substantially larger proportion of the dividends paid by du Pont to its stockholders. It has been du Pont's practice to pass on to its stockholders the dividends received from General Motors less the intercorporate dividends tax thereon (R. 3243), and to pay as dividends about 78% of its total income (R. 1717). This means that in the past decade General Motors dividends have been the source of over 38% of the dividends paid by du Pont (30% of $\frac{100}{78}$).

reason to believe that this percentage will change in the future. But du Pont's stake in General Motors has been, and under the judgment will continue to be, not only in dividends but also in General Motors profits whether distributed or not. The profits, to the extent not paid out as dividends, add to General Motors assets and enhance its earning power and the value of its stock (including that held by du Pont). It is a striking fact that du Pont's General Motors stock has increased in value some forty-fold in the approximate 40 years since acquisition.[27] The market value of its present holdings has ranged during 1960 from approximately $2,500,000,000 to $3,500,000,000.[28]

Du Pont, by retaining its large stake in General Motors, will have constant motive and incentive to promote the business and profits of a company which already is the "colossus" of the automobile industry (*United States* v. *du Pont*, 353 U.S. at 595), and not to deal with it on even-handed terms vis-à-vis its com-

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[27] Du Pont's original acquisitions of General Motors shares constituting, as split, 57,487,500 shares (or over 90% of du Pont's present 63,000,000 holding) have a cost basis for tax purposes of less than 88¢ per share (DX 48, R. 3053), and in recent years the price of General Motors common has averaged above $40 a share (GX 318, R. 2795).

The cost of du Pont's 63,000,000 shares is about $2.09 a share (R. 3187). This higher per share cost is due to the cost of the General Motors shares which du Pont acquired in 1955 when it exercised the right given General Motors stockholders to subscribe for one new share for each 20 shares held at $75 per share (GX 533, R. 2890). The 1,000,000 shares which du Pont acquired in 1955 now constitute, after a later stock split, 3,000,000 shares which have a cost basis for tax purposes of a little over $25 per share (DX 48, R. 3054–5).

[28] The price per share has had a 1960 range of $41 to $55⅞.

petitors. The effect of this influence will impinge not only on the relationships of the two companies in the area of supply of the specific automotive products on which this Court based its findings of violation of Section 7, but also on all the other business and financial relationships or fields of possible competition between the two companies and between each of them and other chemical and automobile concerns. These relationships also must be considered in determining whether the relief ordered by the court is adequate. The relief given by an antitrust judgment, "to be effective, must go beyond the narrow limits of the proven violation". *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, 90. Such a judgment need not "deal only with the exact type of acts found to have been committed". *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409. It may and should close not only the paths to violation shown by the evidence, but also "all of the untraveled roads to that end". *International Salt Co.* v. *United States*, 332 U.S. 392, 400.

Moreover, with respect to the relationship considered by this Court in its ruling on violation—favoritism of du Pont on the part of General Motors stemming from du Pont's ownership of General Motors stock,—the provisions of the judgment below are an inadequate substitute for the complete relinquishment of ownership interest contemplated by the statute and are inadequate to bar consequences Section 7 is designed to prevent. General Motors will necessarily conduct its affairs with knowledge that du Pont owns 23% of its stock; that no other business concern

owns as much as 1/8 of 1% of its stock (GX 146, R. 2702–4); that anything done by General Motors benefiting du Pont benefits the one sizable General Motors stockholder; and that the right to vote du Pont's General Motors stock is vested in du Pont's stockholders (except Christiana, Delaware and du Pont-affiliated officers and directors).

The exercise of voting rights is but one of the avenues of influence over management. Investment bankers and large creditors have long been known to possess extensive power over corporate management without the right to vote a single share of stock. In fact any conscientious management must, in handling other people's money, take into consideration the interests of those investors, as trustees do, even if formal power to direct them or fire them is absent.

Under the judgment below, there will be the potent influence inherent in a stockholder-ownership interest in General Motors much larger than any other single interest.[29] This influence will be buttressed by the right to vote the du Pont-owned General Motors stock lodged in du Pont's stockholders. In addition, practices and viewpoints developed during many years of du Pont's active and prominent participation in General Motors management[30]—through men

[29] General Motors' five largest stockholders of record had the following percentages of its common stock: du Pont, 22.8%; GM Shares, Inc., 2.81%; C. F. Kettering, Incorporated, 0.95%; Corey & Co., c/o Bank of Montreal, 0.88%; Charles S. Mott, 0.73% (GX 146, R. 2702).

[30] See *United States* v. *du Pont*, 126 F. Supp. 235, at 240–241, 244, 246–252 (N.D. Ill.): See also *United States* v. *du Pont*, 353 U.S. 586, 602–605.

bership on its board of directors and committees of the board, through influencing election of board members and top executives, and through holding top executive positions—would be likely to promote continuation of a du Pont-oriented management of General Motors. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control." *North American Co. v. S.E.C.*, 327 U.S. 686, 693.

For relief to be effective, it must be such as will remove influences operating on General Motors' day-to-day conduct of its business generated by du Pont's continued ownership of General Motors stock and the voting rights of du Pont's stockholders. The nature and extent of the future trade relationships of the two companies cannot be precisely forecast, but the business of each is of great magnitude and diversity. Du Pont's commanding position as a supplier of General Motors, as found by this Court on the prior appeal on the basis of the evidence introduced in the case in chief, has been further enhanced. In 1957 du Pont's sales to General Motors constituted 88% of its total sales to all automobile manufacturing companies (GX 179, R. 2752–3); and whereas in 1947 General Motors' total purchases from du Pont were under $27,000,000 (see 353 U.S. at 596), for the years 1955–1957 General Motors' purchases from du Pont averaged over $59,000,000 (GX 179, R. 2752).[31]

[31] The Government offered evidence, which the district court refused to admit, to show the variety of products made by du Pont which it sold to General Motors during the period

It is immaterial in this connection whether or not there is a direct, overt intent to influence conduct of General Motors' business in favor of du Pont. On the prior appeal this Court found that du Pont's ownership of General Motors stock had effects prohibited by Section 7 although the Court assumed the fact that "all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors". 353 U.S. at 607. This fact, the Court said, "does not defeat the Government's right to relief", for a showing that restraint or monopoly was intended "is not requisite to the proof of a violation of § 7" (*ibid.*)

On the prior appeal this Court said that the primary aim of Section 7 of the Clayton Act was "to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil". 353 U.S. at 597. The Court also quoted the Senate Judiciary Committee's statement that the Act's objective was "to arrest the creation of trusts, conspiracies, and monopolies in their inception and before consummation * * *." 353 U.S. at 597.

The district court, however, disregarded Section 7's prophylactic purpose, expressed in the prohibition

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1/1/55–9/30/58 (GX 182, R. 2755–7), and the increasing extent to which chemical companies such as du Pont are expected to supply parts used in manufacturing automobiles (GX 236, R. 2758–2772). An official of du Pont said that he thought people were right in visualizing the car of the future as being made from plastic, and that the only real question was how soon this would occur (GX 236, R. 2766).

against acquisition and retention of stock of another corporation if there is reasonable probability that the intercorporate tie thus created will burgeon into evils (monopolization or restriction of competition) at which the statute is aimed. The court concluded that transfer of voting rights in General Motors stock from du Pont to du Pont's stockholders would sufficiently prevent consequences found to result from du Pont's present ownership of General Motors stock and the judgment entered by the court permits the intercorporate relationship incident to ownership of stock of a value of more than $2,500,000,000 to continue forever.[32]

The Securities and Exchange Commission in ruling on control of an operating public utility by a holding company, as prohibited by the Public Utilities Holding Company Act of 1935, has refused to limit the question of control to the right to vote, and has recognized that stock ownership, notwithstanding divorcement of voting rights, may give rise to forbidden control.[33] The Commission has declared that sterilizing voting power by placing stock in a voting trust does not provide an escape route fror the Public

[32] This separation of ownership from voting power is in one respect more drastic than that involved in the notorious voting trust device which was used in the twenties to insure management control. Many states whose corporate laws permitted voting trusts limited their term to ten years. See Berle and Means, *The Modern Corporation and Private Property* (1937), 77-78. Here the separation is without time limit.

[33] In this area in which the Commission has special competence and experience, its rulings are, we submit, of significance and weight.

Utility Holding Company Act, the Congressional purpose being to prevent easy avoidance of the Act by "modal arrangements" which do not materially alter status. *In the Matter of H. M. Byllesby & Company*, 6 S.E.C. 639, 649–650, 653–654.[34] The Commission there observed (*id.* at 654):

> We are doubtful that a voting trust (except possibly a voting trust established solely for the purpose of liquidation) can ever operate effectively to insulate the control which ownership of a block of stock carries.

Similarly, the Commission, in passing upon a plan submitted by a holding company (United Corporation) to bring itself into compliance with the Act by divestment of its public utility stock, expressed disapproval of a provision that, pending divestment, United would not vote its stock save with the Commission's express "permission". United urged that it should be left free to convey to the managements of the subsidiaries its affirmative views on matters of policy, and that under its proposal the subsidiaries would be insulated against "possible control". The Commission observed that, having regard for the past relationships of United to its subsidiaries, any expression of its views regarding policy matters would be "equivalent to a controlling influence." *In the Matter of the United Corporation*, 13 S.E.C. 854, 897–898.

A public utility was declared to be a controlled subsidiary of a company which owned about 47% of its common stock and which furnished the utility

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[34] See also *In the Matter of International Paper and Power Company*, 2 S.E.C. 274, 277–278.

with tax, accounting, auditing, and engineering assistance, although because of default in payment of dividends on the utility's preferred stock "voting control [had] passed to" its preferred stockholders. The Securities and Exchange Commission said that "controlling influence may spring as readily from advice constantly sought as from command arbitrarily imposed". *In the Matter of Manchester Gas Company*, 7 S.E.C. 57, 60–63.

The issue of what relief is necessary and appropriate against a violation of Section 7 of the Clayton Act is closely akin to the relief requisite against a Sherman Act violation grounded on acquisition and retention of stock of another company or companies. In this situation stock divestiture has been the remedy uniformly found necessary. *Supra*, pp. 35–36. But it has also been held that, in addition to stock severance, any continuing interest in the financial success of the severed company should be eliminated.

Continental Insurance Co. v. *United States*, 259 U.S. 156, was an appeal from the judgment entered following this Court's decision in *United States* v. *Reading Co.*, 253 U.S. 26, that, in view of a holding company's acquisition and ownership of all of the stock of a railroad and a coal company, the judgment should provide for complete independence of the two operating companies. The judgment entered on remand required disposition of the Coal Company's stock, and further required the Railroad to assume the whole liability under a $93,000,000 bond issue which was secured by a mortgage on the property of both the Railroad and Coal Company. The Coal Com-

pany, in partial consideration of this assumption of liability, was required to deliver to the Railroad $25,000,000 of bonds secured by a mortgage on the Coal Company's property. This Court unanimously held that in these circumstances there was "constant motive" for inter-company favoritism and "community of operation", inconsistent with effective relief. 259 U.S. at 167–168, 171, 173. It directed modification of the judgment so that the Railroad and Coal Company should each be liable for only a specified portion of the outstanding bond issue.[35] *Id.* at 173.

Under the district court's judgment in the instant case, du Pont has a direct and immediate stake in the future financial success of General Motors, a stake far transcending the contingent stake found to be objectionable in *Continental Insurance.* There is thus clear incentive for du Pont's favoritism of General Motors and, on the other hand, incentive for General Motors favoritism of du Pont. Without assuming that General Motors' management would be in any sense a mere tool of du Pont, this management cannot fail to be aware that a large segment of its electorate—du Pont stockholders—stand to benefit by any action taken by General Motors which promotes du Pont's interests, and to suffer from any such action detrimental to du Pont's interest.

The very fact that the district court included as Article V of its decree injunctive provisions against certain types of dealings between du Pont and Gen

[35] The liability of each was to be the ratio of the value of its property pledged under the mortgage to the value of all property pledged thereunder.

eral Motors seems to be a veiled recognition that merely restricting voting rights will not prove effective in terminating the violation. But such measures as injunctions against preferential treatment, joint ventures, and requirement contracts attack not the core of the violation but the results. It is in effect treating an illness by suppressing the symptoms, and in the long run must prove equally ineffective. We do not believe it possible to frame a decree, or to enforce one once framed, which can adequately deal with the myriad of relationships between du Pont and General Motors, and between each of them and other chemical and automotive concerns, which will forestall the effects of the illegal relationship. If such a decree could be framed, its enforcement would be likely to involve the government, the courts and the companies involved in interminable litigation in an attempt to plug up new aspects of restraints and monopolies as they develop. This Court dealt with this issue in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, where the defendants claimed that injunctive relief should be sufficient without ordering divestiture. The Court stated at 189–190:

> The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assur-

> ance that no such opportunity will be available in the future. Hence we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available.

The judgment in the present case departs in other important respects from the teaching of Sherman Act cases. Under the judgment, not only does every present and future du Pont stockholder have an interest in General Motors by virtue of being a du Pont stockholder, but also every such stockholder (with specified exceptions) has the right to vote General Motors stock. In various Sherman Act cases it has been found appropriate that divestiture be such that it eliminate all stock interest and voting rights on the part of both the divesting company *and its stockholders.*

The judgment reviewed in *Continental Insurance* provided in substance that the Railroad stockholders be given the right to purchase one share of Coal Company stock for each share of Railroad stock, but that they be barred from voting or receiving dividends on the Coal Company stock. The Coal Company's stock was to be transferred to a trustee to be appointed by the court, who would have exclusive right to vote and receive dividends on this stock, and would issue transferable certificates of interest. The Railroad was to offer these certificates for pro rata subscription by its stockholders at a nominal price. The certificates were to be exchangeable for the stock represented thereby,

but only upon affidavit by the certificate holder that he owned no Railroad stock. The certificate holder was also to receive, on such exchange, the dividends received by the trustee on the Coal Company's shares represented by his surrendered certificate. See *Continental Insurance, supra,* 259 U.S. at 162–163; *Decrees and Judgments in Civil Federal Anti-Trust Cases* 594–595, 597–599, 609–610.

In *United States* v. *Union Pacific R.R. Co.,* 226 U.S. 61, this Court held that the Union Pacific's acquisition and retention of 46% of Southern Pacific stock violated the Sherman Act, and that the judgment entered should require divestiture and bar, in the interim, voting the stock or receiving dividends thereon, 226 U.S. at 96–97. In *United States* v. *Union Pacific R.R. Co.,* 226 U.S. 470, the Court held that distribution of the Southern Pacific stock to Union Pacific's stockholders in proportion to their stock holdings would not be adequate divestiture. It rejected the contention that "in view of the great number of widely scattered stockholders of the Union Pacific Company, there is no probability of their acting together to continue" Union Pacific's control of Southern Pacific. 226 U.S. at 475. It said that it was the object of the statute "to end such combinations," and that the judgment entered must be such as will "most thoroughly effectuate that purpose". *Id.* at 475–476. Following this decision, the judgment which was entered had substantially the provisions of the judgment reviewed in *Continental Insurance, i.e.,* putting the stock to be divested in the hands of a trustee, issuance by him of certificates of interest to

be distributed to the divesting company's stockholders, right to receive the stock represented by such certificates only if the certificate holder presents to the trustee an affidavit of non-ownershp of stock of the divesting company. *Decrees and Judgments in Civil Federal Anti-Trust Cases* 223–229, 238–239.

Divestiture judgments have not uniformly forbidden passing on the divested stock to the divestor's stockholders. But in that situation the stockholder-distributees would normally sell from time to time, for investment or other reasons, the divestor's stock, or the divested stock, or both, thus breaking up common ownership of these stocks. The instant case is radically different because, under the judgment below, ownership of du Pont stock automatically carries with it both an ownership interest in General Motors and the right to vote its stock. Community of stockholder interest and voting rights in du Pont and General Motors is thereby perpetuated.

Common ownership of the stock of two companies, even if divorced from voting power, has been recognized as a barrier to effective divestiture. After the decision in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, defendant Radio-Keith-Orpheum and the United States consented to entry of a judgment requiring R.K.O. to put its exhibition assets into a new corporation and its production-distribution assets into another new corporation, after which R.K.O. was to dissolve, leaving its stockholders with the stock of these two new corporations. The consent judgment provided that within a year Howard R. Hughes, owner of 24% of R.K.O.'s stock, either sell his holdings of

stock of one or the other of the two new corporations or transfer the stock of one of them to a voting trustee, to hold until Hughes sold all the stock of one of the two new companies. In *Hughes* v. *United States*, 342 U.S. 353, this Court recognized that this 24% ownership interest in both companies, though shorn of voting power as to one of them, may "endanger * * * the independence of each" (342 U.S. at 357), and that therefore, if there had been no consent judgment, the district court might properly have ordered divestment with respect to Hughes' stock (342 U.S. at 357).[36]

See also *United States* v. *Aluminum Co. of America*, 91 F. Supp. 333, 418–419 (S.D.N.Y.), which held that appropriate and necessary antitrust relief included requiring the stockholders of Alcoa "to dispose of their stock interests either in Limited [Aluminium Limited] or in Alcoa."

Although, as we shall point out below, we do not believe that divestiture of the General Motors stock by du Pont need impose any financial loss on the stockholders of either du Pont or General Motors, if such loss were inherent in the divestment, that would be no excuse for not imposing that requirement where substitute remedies would not provide adequate protection to the public against violation. In *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189, the defendants urged that the stock divestiture provisions of the district court's judgment were "inequitable and harsh income tax wise", were "punitive" and exceeded

[36] Modification of the terms of the consent decree, absent a hearing thereon and absent evidence to show need for modification, was held to be improper.

"any reasonable requirement for the prevention of future violations". But this Court said that antitrust violators may not avoid an undoing of their unlawful conduct "on the plea of hardship or inconvenience", and it held that the requirement that minority stock holdings of persons not parties to the proceeding be divested was "no legal barrier" to grant of this relief, 323 U.S. 189, 190. In *International Boxing Club* v. *United States*, 358 U.S. 242, which affirmed the requirement that two defendants divest themselves of their Madison Square Garden stock,[37] the Court noted, but treated as irrelevant, the claim that the enforced divestiture would result in "great loss" to these stockholders. 358 U.S. at 256. The Court also ignored the contention (Appellant's Brief 31–32) that the divestiture requirement might depress the value of the stock of other stockholders not charged with any illegal conduct.

This Court has approved several antitrust judgments providing for divestiture upon terms and conditions which necessarily were substantially injurious to the property interests of stockholders of the divesting corporation. The judgments to which we refer provided: (1) That the stock to be divested be transferred to a court-appointed trustee: (2) that the trustee issue negotiable certificates of interest; (3) that the divesting corporation offer these certificates, at a nominal price, pro rata to its stockholders; and (4)

[37] The stock to be divested was 219,000 shares of the 563,000 shares then outstanding, or 46% of the total (double du Pont's percentage of General Motors stock). Also in *International Boxing* the maximum time for effecting divestiture was seven years, whereas here the Government has suggested a divestiture period of 10 years.

that the certificates be exchangeable for underlying stock only upon affidavit by the certificate holder that he is not a stockholder of the divesting corporation.[38] Under these judgments, divestiture decreased the value (and hence market price) of the divesting corporation's stock, but stockholders could not obtain the equivalent of this loss in value without making a "forced" sale, that is, without selling either the stock of the divesting corporation or the stock which it had divested.

We submit that there is no doubt that here the district court, in determining what relief is necessary and appropriate to terminate the antitrust violation, improperly gave primacy to protection of the private interests of stockholders. At the outset of the relief hearing the court declared that the "primary" problem to be resolved was to promulgate a judgment remedying the Section 7 violation without "penalizing" these stockholders; that equity and justice "demand" that the judgment "protect" their interests; and that the "big problem" respecting relief was to redress the law violation without punishing "innocent people" (R. 261). In its opinion, the court quoted this initial declaration (R. 3197), and thereby reaffirmed its view as to the primacy of protection of stockholder interests.[39] The court later stated that it

[38] *United States* v. *Reading Co.*, 253 U.S. 26, 259 U.S. 156; *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, 226 U.S. 470; *United States* v. *Lehigh Valley R.R. Co.*, 254 U.S. 255 (see *Decrees and Judgments in Civil Federal Anti-Trust Cases*, 697–698).

[39] The quoted statements also define what the court meant when it said that its "primary duty" was to devise a judgment providing effective antitrust relief (R. 3196).

would not "assume the responsibility" of entering a judgment involving a "serious risk" of substantial losses to thousands of stockholders (R. 3263). This is the equivalent of a statement that, irrespective of whether divestiture constitutes the only adequate and assured remedy against further violation of Section 7, the court would not grant this remedy if in the court's opinion stockholders would thereby be subjected to serious risk of substantial loss.

Neither under the decisions to which we have referred nor under the statute was the court authorized thus to balance, and to overbalance, protection of stockholder interests against effective antitrust relief. Its duty was to enter a judgment to "prevent and restrain" further violation of Section 7. The court's obligation was to determine the kind of remedy which would most assuredly and effectively prevent and restrain—on the facts here, to determine whether divestiture or some substitute for divestiture provides the better remedy. After this determination had been made, the court could properly consider how the chosen remedy could be implemented, for example, how divestiture could be carried out, without unnecessary or avoidable stockholder injury. This, however, was not what the district court did—it made protection of stockholder interest a decisive factor in its determination of the character of the remedy which it would apply in order to prevent continuance of the illegality found by this Court.

III

DIVESTITURE BY DU PONT OF THE GENERAL MOTORS STOCK CAN BE ACCOMPLISHED WITHOUT UNDUE HARDSHIP TO THE STOCKHOLDERS OF EITHER

Not only are the devices substituted by the district court for divestiture not adequate to protect the public, but, equally important, there is no reason why the normal relief of divestiture should not be required in this case. The appellees have failed to establish that it is not entirely feasible to carry out such divestiture without undue financial loss to the stockholders of both du Pont and General Motors. The findings of the District Court to the contrary are based upon its analysis of a single proposed plan which the court found objectionable without any apparent consideration of whether alternative methods or a combination of such methods within the framework of divestment might not obviate the objections. We believe that the projected losses are not inevitable and that, in any event, they can be minimized without accepting an inadequate substitute for the normal relief contemplated by Congress.

The argument that divestiture would cause disastrous financial losses is based partially on the impact of federal income taxes and partially on forecasted disruption of the market values of du Pont and General Motors stock.

We believe that the impact of federal taxes is not a pertinent factor in ordering relief in an antitrust proceeding. What transactions shall be taxed, and how much, is a question of federal tax policy and it

is not a proper function of the judiciary to tailor a decree either to add to or to avoid federal taxes. The function of taxation is to distribute the cost of maintaining the government among its citizens and the determination of who should bear the cost and in what proportion is purely a matter of legislative judgment. Long ago in *Veazie Bank* v. *Fenno,* 8 Wall. 533, the Court said (at 548):

> The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.

And these views have been repeated many times since then. See, *e.g., McCray* v. *United States,* 195 U.S. 27; *United States* v. *Doremus,* 249 U.S. 86; *Nigro* v. *United States,* 276 U.S. 332; *Sonzinsky* v. *United States,* 300 U.S. 506; *United States* v. *Sanchez,* 340 U.S. 42; *United States* v. *Kahriger,* 345 U.S. 22. And see Cardozo, J., dissenting in *United States* v. *Constantine,* 296 U.S. 287 at 297–299.

The appellees do not of course contest this proposition, but argue that the tax burden falls unfairly when acquisitions or dispositions which are ordinarily effected voluntarily are forced upon taxpayers by reason of federal law or court decree. But how such events should affect tax liability is also a matter for legislative judgment. Congress has dealt specifically with involuntary conversions of property arising from events beyond a taxpayer's control. 26 U.S.C.

1033. In the case of the Public Utility Holding Company Act, it passed legislation to relieve investors in utility holding companies from tax burdens which would otherwise have fallen on them by reason of reorganizations required to be performed by Section 11 of that Act. 26 U.S.C. 1081–1083. The same was true under the Bank Holding Company Act. 26 U.S.C. 1101–1103. By 26 U.S.C. 1071 comparable treatment is provided for sales or exchanges required by the Federal Communications Commission. And with respect to antitrust divestitures the last Congress gave consideration to whether some relief was appropriate with this very case in mind, but took no action on the pending bills. S. 200; H.R. 8126, 86th Cong., 1st Sess.

In *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, the defendants there involved complained that the provisions of the decree were "inequitable and harsh income tax wise." The Court brushed aside this objection with the statement that violators of the antitrust laws may not "avoid an undoing of their unlawful project on the plea of hardship or inconvenience. * * * There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure [injunction against future violations] when another effective one is available." 323 U.S. at 189–190.

When the court below gave such weight to the tax aspects of divestiture it was trespassing on the field reserved for Congress. While it is entirely appropriate for an antitrust act defendant to rearrange its stockholdings in a manner which will reduce its, and its stockholders', tax burdens, that is a matter between it and the tax authorities and Congress, and the court

is not a proper tribunal to provide relief. The imposition of taxes is not a punishment and should not have been accorded the consideration which it was by the court below.

With respect to the threatened disruption of the market for du Pont and General Motors stocks, the basis for the court's findings is that a large volume of stock will be poured out into the market in a short period of time, partially by reason of the direct requirement that General Motors stock received by Christiana and Delaware be sold and partly by voluntary sales by other du Pont stockholders made necessary in order to pay taxes or to avoid tax problems.[40] We of course agree that consideration of such foreseeable effects of a plan of divestiture are a proper consideration for a court in framing a decree; a court should not impose requirements which will cause stock to be dumped on the market faster than it can be digested. But once a court has taken every precaution to encourage an orderly distribution and has given the parties concerned the opportunity within the framework of a divestiture order to arrange the program so as to fit in most readily with their financial needs, then the court cannot speculate as to intermediate short-range market fluctuations. History has proved that large scale forced distributions can be carried

[40] Merger of Christiana and Delaware with du Pont, which would be tax free, would sharply reduce the amount of General Motors stock to be sold by the trustee by eliminating the distributions of General Motors stock to Christiana and Delaware which under the present setup would be made on account of the du Pont holdings of those two companies (R. 64–66). The reduction would be from a little over 19,000,000 shares to 535,500 shares. (See R. 3210.)

out without financial loss to investors, and even in some cases with ultimate profit.

The antitrust judgment entered in *United States* v. *Aluminum Company of America*, 91 F. Supp. 333, 418–419 (S.D.N.Y.), required divestiture during a 10-year period beginning in 1951 of approximately 35% of the outstanding common stock of Aluminium, Ltd., and as of December 31, 1958, nearly 90% of the stock required to be divested had been divested (GX 438, 439; R. 2842–4).[41] Notwithstanding the large amount, percentage-wise, of Aluminium stock which came on the market because of the divestiture judgment during the 1951–1957 period, and notwithstanding that during this period Aluminium made three offerings of stock to its stockholders, each of 10% of its then outstanding stock, the stock's market-price performance during this period has been better than that of industrials generally (as measured by Standard & Poor's stock price index for industrial common stocks). (GX 439, 447; R. 2844, 2850.)

The Securities and Exchange Commission in commenting on the effect of the enforcement of the Public Utility Holding Company Act stated at page xxvii of the foreword to its 25th Annual Report:

> * * * The utility industry as a whole is enjoying financial health and stability, and has been able to finance expansion programs of unprecedented proportions largely out of new money raised from the public sale of securities. It is interesting to note in this connection that a study made by the Commission in 1951 of the

[41] 7,727,850 shares to be divested; 6,638,295 shares divested by the end of 1958 (*ibid.*).

market values of the common stocks of 12 holding companies between the dates of their registration with the Commission and September 24, 1951, showed that in each instance the market value of the company's stock increased during that period and in almost all instances the rate of increase substantially exceeded the rate of increase in the Dow Jones utilities averages. Holders of utility preferred stocks have similarly benefited in that all dividend arrearages have been satisfied and the holders have been accorded securities and cash representing the fair value of their investments.

In actuality, then, the feared integration and simplification provisions of the law have been vindicated and those who condemned the act have come to praise it. That which was once denounced as a death sentence to the progress of the utility industry is now generally regarded as having been the means of its regeneration.

See also Blair-Smith and Helfenstein, *A Death Sentence or a New Lease on Life?*, 94 U. of Penn. L. Rev. 148.

The district court made extensive findings of fact which appear at first glance to contradict this position, finding that divestiture would result in tremendous losses to both the stockholders of du Pont and General Motors. The weakness in these findings is that they were not based on divestiture itself, but on du Pont's evidence as to the results of the particular scheme for divestiture proposed by the Government. We do not agree with this appraisal of the results of the plan, but for the purposes of this argument let us assume that the court was right and that

the plan suggested by the Government would disrupt the market. The answer is to amend the plan to minimize these effects, not to abandon divestiture unless it is clear that no modification is possible to remedy the defects in the proposal. Divestiture as the proper Section 7 remedy is not to be scrapped merely because a particular proposed form of it is open to improvement.

Effective divestiture can be achieved through a judgment in which the single, basic command would be that du Pont divest itself of a stated number of General Motors shares each year, with du Pont empowered to choose what methods of disposition it will employ and the extent to which it will utilize particular methods. Such judgment would permit du Pont to change its divestment program from time to time and from year to year, subject to the single requirement that the stated minimum number of shares be divested by one method or another. Thus du Pont would be free to exercise its own judgment as to the methods of divestment, and combination of methods, most advantageous to it, its stockholders and General Motors stockholders, and du Pont would be free to reformulate its divestment program from time to time in the light of actual experience.

While such a judgment would fix the minimum number of shares to be divested each year, it might be found advisable, after hearing, to prescribe a lower minimum for the first few years than for later years. It might also be advisable to provide that after the judgment has been in effect for a given period, for example, four years, either the United States or du

Pont may apply to the court for a change in the minimum, such change, upward or downward, to be made upon the basis of actual operations under the judgment.

We do not attempt to canvass all possible methods by which divestment might be effected under such a judgment, and merely call attention to certain of the methods obviously available to du Pont, namely, (1) exchange offers, (2) distributions to du Pont stockholders, and (3) sale of General Motors shares.

(1) *Exchange Offers.* Du Pont could offer to exchange a given number of General Motors shares for du Pont's 4½% preferred stock, and make a like exchange offer for du Pont's 3½% preferred stock and for its common stock, with retirement of stock received through acceptance of such offers.[42]

Divestment by this means would cause no forced selling of du Pont stock or General Motors stock, and from the tax angle would be very advantageous. Du Pont would pay no tax on the exchange,[43] and accepting stockholders would be taxable on the basis of a capital gain or a capital loss (measured by the difference between the value of the General Motors shares received and the stockholder's cost basis for the surrendered du Pont shares).[44]

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[42] Retirement of surrendered du Pont stock would appropriately shrink du Pont's capital stock account, in approximate correspondence to the shrinkage in its assets due to divestment of General Motors stock through exchange offers.

[43] See 26 U.S.C. 311(a), 317(a); Treasury Regulations 1.311–1(a).

[44] See 26 U.S.C. 302(a), 317(b).

There would seem little limit on the number of shares that might be divested by exchange offers provided du Pont chooses to make reasonably favorable offers. The two classes of preferred stock, with a par value close to $240,000,000 (GX 692, R. 3020), have a narrow price range and the capital gains tax would be a very slight deterrent to acceptance of favorable exchange offers.[45] This would also be the case as to the holders of hundreds of thousands of shares of du Pont common stock. Recent prices for du Pont common have been close to the low of the last several years, so that, unless the price goes sharply higher, hundreds of thousands of shares will have a cost basis permitting an exchange (favorable at current prices) for General Motors shares without any capital gain or with only a nominal capital gain. Moreover, tax-exempt charitable or educational organizations, holders of more than 2,275,000 shares of du Pont common (DX 24, R. 3030), may make exchanges without tax liability.

(2) *Stock Dividends.* Distribution of General Motors shares as stock dividends to du Pont stockholders is another means of effecting divestment without tax liability to du Pont. Whether or not du Pont stockholders would have to pay greater taxes than they are accustomed to would depend on whether or not during the distribution period du Pont limits its cash dividends in a given year to an amount not exceeding the difference between the value of the dis-

[45] On assets held for more than six months, only half the capital gain is taxable and the maximum rate is 25%.

tributed General Motors shares and du Pont's normal dividend payment.

Substantial distributions of General Motors shares to du Pont stockholders could be made in this manner with only minor variation in du Pont's cash dividends. For example, if during a given year du Pont should distribute one General Motors share for each 40 du Pont shares, it would divest itself of about 1,150,000 General Motors shares.[46] At the recent price of General Motors common in the low 40's the distribution would have a value of little over $1.00 per share of du Pont so that a $1.00 reduction in du Pont's "normal" cash dividend would mean that the stock distribution would impose no additional tax on its stockholders.[47]

A decree such as we are discussing would not *require* du Pont to adjust its cash dividends by reason of distributions of General Motors stock distributed during the year, but, if it did not make this adjustment, any additional taxes payable by its stockholders would be the product of du Pont's own action and not of the antitrust judgment. Obviously, injury of this kind is not even remotely relevant to the question of appropriate antitrust relief.

Possibly du Pont will contend that payment of dividends partly in cash and partly in stock would ad-

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[46] On December 31, 1958, du Pont had 45,731,528 shares of common outstanding (GX 692, R. 3020).

[47] Du Pont's cash dividends for the last four years have averaged $6.50; 1956 and 1957, $6.50; 1958, $6.00; 1959, $7.00 (Moody's 1960 *Industrial Manual*, p. 1041). Accordingly, a $6.00 cash payment would be within the range of du Pont's dividend "policy", and a total dividend payout of $7.00 would be within this range.

versely affect du Pont and General Motors stockholders. The court made no such finding.[48] There was vague, almost *pro forma* testimony as to such adverse effect (R. 1542–3, 1729, 2086, 2091), but even this unpersuasive type of evidence dealt with the effect of mandatory distributions under the terms of the Government's judgment proposals. It therefore has little or no application to the effect of stock distributions made under a judgment giving du Pont freedom (1) to divest or not divest by this means, (2) to decide when and how much stock should be so divested, and (3) to keep the total dividend paid during the year within its normal dividend payout.

A number of large corporations have followed the policy of paying dividends partly in stock and partly in cash. They at least have found the advantages of such a policy to be greater than the disadvantages. Payment of a dividend partly in stock of another corporation is somewhat rare, but Standard Oil Company (Indiana), after it had for seven years paid dividends partly in cash and partly in stock of Standard Oil Company (New Jersey), publicly announced that it intended to continue this dividend policy (GMX 30, R. 3152–4).[49] See also GX 685, R. 3001;

[48] Compare its finding as to dividends paid wholly in stock (R. 3224).

[49] It stated that this policy "has the advantages of conserving cash, of saving capital gains taxes to the Company, and of giving stockholders receiving the Jersey stock the option of either holdling a valuable stock or selling it to augment their cash income" (GMX 30, R. 3154).

DX66, 3068A. The evidence shows dividend payments of this kind by another company (R. 2543, 2545), and du Pont itself paid such a dividend in 1935 (Moody's 1936 *Industrial Manual*, p. 1950).[50]

(3) *Sale of General Motors Shares.* Under the suggested judgment du Pont would be free to divest by utilizing any or all of various selling techniques. It would also be unrestricted as to those to whom sale could be made except that, because of the close ties between Christiana, Delaware and du Pont, the judgment should bar sale to either of these du Pont-tied holding companies.[51]

Du Pont stockholders would be subjected to no tax liability by reason of du Pont's sale of General Motors shares. Its own tax liability on such sales is defined

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[50] The district court believed it certain that, if du Pont retained funds because of distributing to its stockholders General Motors shares rather than cash, this would "enhance the power and position of the du Pont Company and perhaps create new antitrust problems for both the Company and the Department of Justice in the future" (R. 3248). But it would be sound corporate practice for du Pont to utilize most of the retained funds to purchase and retire its stock, thereby reducing its capital stock account in rough correspondence with the reduction in assets caused by divestment of General Motors stock. Furthermore, such purchases would create additional demand for du Pont stock, and this demand would offset such additional supply as resulted from selling by stockholders dissatisfied with dividends paid partly in cash and partly in stock.

[51] We note that Christiana and Delaware have announced plans to merge, contingent upon obtaining requested clearance by the Internal Revenue Service and the Securities & Exchange Commission. Consummation of the planned merger would render moot a ban in the antitrust judgment against sales to Delaware. Moreover, if Christiana and du Pont should merge, following merger of Christiana and Delaware, this would render moot all restrictions of the antitrust judgment relating to Christiana and Delaware.

and specific—it would be subject to the capital gains tax of 25% on the difference between its cost basis and net amount realized on sale. With General Motors common recently selling in the low 40's, a reasonable assumption is that du Pont's average capital gain would be about $40.00 per share,[52] and the tax thereon about $10.00 per share. Thus, if du Pont used sale as the method of divestment for as many as 3,000,000 General Motors shares per annum during the divestment period, the resulting tax of about $30,000,000 would be only 66¢ per share of du Pont common stock.[53]

Nor is the tax too much to bear if considered on the basis of the entire divestiture of du Pont's 63,000,000 General Motors shares. It is doubtful that du Pont would divest as much as half of its General Motors shares by means of sale, but even if half were divested by sale, the capital gains tax would be about $315,000,000, spread over a period which might be in the neighborhood of ten years. This tax is to be compared with the fact that du Pont has had an increase of over $2,500,000,000 in the market value of its investment

[52] Du Pont's cost basis for its General Motors shares is approximately $2.09 (R. 3187).

[53] On December 31, 1959, du Pont had 45,807,044 shares of common outstanding. Moody's 1960 *Industrial Manual*, p. 1041. A tax (attributable to a judgment of divestiture) of some 66¢ per share per annum during the distribution period must be viewed in the perspective of the 1960 range (to date) of over $85 between the high and low price of du Pont common. New York Stock Exchange: high, 266½; low, 178¾. The 1959 range was comparable: high, 278¾; low, 202½. Moody's 1960 *Industrial Manual*, p. 1035.

in General Motors,[84] by reason of a holding of stock adjudged illegal. Apart from this vast increase in market value, du Pont has received, since 1947, dividends of over $1,350,000,000 on its General Motors stock,[85] more than ten times the $131,500,000 cost of the stock.

There remains the question of whether sale by du Pont of General Motors shares would unduly impair the market price of General Motors stock. We think it necessary, initially, to distinguish between any impairment of market price resulting merely from increase in the supply of stock available to the market and impairment of market price otherwise caused. If in the past General Motors stock has sold at a higher level because 23% of the outstanding stock has been du Pont-owned and withheld from the market, this market-price advantage is not one giving rise to even an equitable claim to its continuation. A judgment of divestiture ordinarily means, and requires, unfreezing a stock holding which, from a market standpoint, stood frozen.

We submit that it is clear on the evidence in this case that du Pont, to the extent that it might choose to divest General Motors stock by means of sale, could

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[84] The cost to du Pont of its 63,000,000 General Motors shares is less than $131,500,000 (DX 48, R. 3055). The present value of these shares taking Generals Motors at 42, is $2,646,000,000.

[85] Dividends of $972,500,000 received 1948 through 1957 (GX 90, R. 2686A). Dividends of $378,000,000 received 1958 through 1960.

The figure on dividends received since 1947 does not, of course, reflect the hundreds of millions of dividends received on the General Motors shares during the period 1917–1947.

sell without appreciable or significant effect on the market price of General Motors stock.

In the first place, General Motors' own demand for its common stock would provide a very substantial sales outlet. General Motors has needed annually well over 1,000,000 shares of its common for its Bonus Plan, and also over 1,000,000 shares for its Savings-Stock Purchase Program (GX 172, R. 2731). The requirements of the Bonus Plan have been met by open market purchases, and those of the Savings-Stock Purchase Program by purchase of newly issued shares (*ibid.*). But if the antitrust judgment required du Pont to divest itself of its General Motors stock, du Pont obviously could supply all of the stock needed by General Motors for its Bonus Plan and its Savings-Stock Purchase Program. Furthermore, General Motors could purchase this stock from du Pont on a basis profitable and fair to both seller and purchaser.[56]

The district court said that the Bonus Plan requirements could not be considered as a sales outlet for General Motors shares sold pursuant to a divestiture judgment, for the reason that if the required

[56] It could be agreed that the price to be paid for shares purchased during any month would be the average of the New York Stock Exchange closing prices during the month.

Substituting direct purchase from du Pont for purchases on the open market would have the advantage, for General Motors, of eliminating brokerage commissions paid on such purchases. Direct sale by du Pont to General Motors would have the advantage, for du Pont, of eliminating brokerage commissions on open market sales, or eliminating the underwriters' commission on stock sold through underwritten offerings.

stock were purchased from du Pont, this would eliminate the market support provided by General Motors' previous open market purchases (R. 3215). Our disagreement is not with the court's factual conclusion, but with the implication drawn from it. This implication is that, if the divestiture judgment should lead to loss of the market support furnished by General Motors' purchases of its own stock on the open market, the effect on market price resulting from such loss may validly be asserted to be an unfair or inequitable consequence of the divestiture judgment. Support of the market price of its own stock is not, as such, a proper function of General Motors. General Motors stockholders therefore have no legal or equitable ground for complaint if, as a result of a divestiture judgment, this support is withdrawn.

The district court rejected the Savings-Stock Purchase Program requirements as a sales outlet for stock sold under a divestiture judgment, upon the ground that it would be of doubtful propriety for the court, through its antitrust judgment, "to dictate the financial policy of General Motors" (R. 3215–16). This statement may be sound as an abstract proposition, but it is totally irrelevant. Acquisition of newly issued stock to fulfill the Program's requirements was not a means for obtaining new equity capital by General Motors—it itself furnished funds for acquiring the newly issued stock—, and the evidence shows that the policy of issuing new stock to fulfill the Program's requirements was adopted because

there appeared to be no other practicable way of obtaining the needed stock. The president of General Motors gave as a reason for use of newly issued stock for the Program" that "it may not be possible or practical to acquire the shares required for this plan in the open market" (GX 147, R. 2705).

The evidence abundantly shows that such stock as du Pont might choose to divest by means of sale, over and above stock sold to General Motors for its own needs, could be sold without material adverse effect on the market price of General Motors stock.

We have previously referred to the evidence that there is a vast and expanding demand for common stocks on the part of institutional investors; that during the seven years before the hearing all offerings of common stock of industrial or utility corporations having a subscription price of $25,000,000 or more had been sold with no disturbance (other than minor and temporary) to market price; and that an expert on the securities market testified that present and anticipated earnings and dividends are the basic, long-term determinants of stock prices (*supra*, pp. 13–15). We now turn to evidence relating still more specifically to the question whether du Pont, in fulfilling its obligations under a divestiture judgment of the kind we have suggested, could sell General Motors stock without material impairment of the stock's market price.

Evidence showed the market's ready acceptance of large offerings of General Motors common. In April

1956 a secondary[57] offering of over 1,275,000 shares was sold within 24 hours and was heavily oversubscribed, with substantial demand for more stock than was available (R. 629–30, 664). In 1958 a secondary offering of 267,678 shares of General Motors common was sold within five minutes of the offering (R. 926). In 1955 over 4,000,000 shares of General Motors common (the present equivalent to over 13,000,000 shares, R. 540–1) were successfully marketed pursuant to an offering which granted General Motors stockholders a pro rata right to purchase additional shares (GX 64, not printed). The offering, at a subscription price of over $300,000,000, was the largest industrial offering under rights that has been made (R. 506–7).

A 1956 secondary offering of Ford Motor Company common stock involving a total subscription price of $658,000,000 and representing 19% of the total equity of the company, was heavily oversubscribed by the public notwithstanding the statement in the prospectus that the seller, the Ford Foundation, might subsequently sell additional shares (R. 590–3, 611).[58] Illustrative of the demand for this stock was a statement by the underwriters that it

[57] A secondary offering is an offering of stock already outstanding, so that the proceeds of sale go to the selling stockholder rather than to the company whose stock is sold (R. 593).

[58] The Government's district court proposal called for annual sale by the Trustee of less than 2,000,000 General Motors shares, or a total sales price (at a price as high as $45 a share) of under $90,000,000. This is less than ¼ of the total sales price for the successful offering of Ford Motor stock and the Trustee's sales during the entire 10-year divestiture period would be less than 1.4 times the 1956 Ford Motor offering.

"could have easily doubled" its sales of 343,251 shares if they had been available (GX 519, R. 2867). A further secondary offering of Ford Motor common owned by the Ford Foundation was made in 1959; the subscription price was $113,000,000; the prospectus stated that the Foundation may from time to time sell further portions of its holding (62% of the outstanding stock); and the offering was fully subscribed within two days of the opening of the subscription books (R. 2554, 2557–9). In December 1959, after close of the evidentiary hearing, there was a third secondary offering of this stock amounting to approximately $164,000,000, reported to the press by the managing underwriter as being "oversubscribed on the first day".[59]

A secondary offering of common stock of the Great Atlantic & Pacific Company, for a subscription price of about $80,000,000, was made early in 1959, and the offering was oversubscribed although some or all of the Hartford family's and Hartford Foundation's 72% stock interest in the company might later come on the market (R. 2404–5; GX 688, not printed; DX 63, not printed).

The stock market's ability to absorb successive offerings of the securities of a company having, like General Motors, a notable earnings and dividends record is shown by the fact that during the period 1946–1958 American Telephone and Telegraph Company made nine successful security offerings, eight of convertible debentures and one of common stock, having an aggregate subscription price of over $4,500,000,000

[59] *New York Times*, December 10, 1959, p. 59, col. 7.

(GX 1, R. 2644A) and by the fact that its total equity financing in this period was $7,200,000,000 (R. 319, 320).

Du Pont would have a wide choice in the machinery or mechanics to be used in making sales. Aside from direct sales to General Motors it could negotiate direct sales to institutional investors such as pension funds, insurance companies, etc. It could arrange for the underwriting of secondary offerings. It could sell through brokers on the open market. In the latter connection we note that General Motors has been purchasing over 1,000,000 shares a year on the open market (*supra,* p. 73). Dr. Friend, an expert on security markets, testified that purchases of this magnitude would be expected to have a "rather modest" stimulating effect on price, and that he saw no reason why sale of a comparable amount of stock should have any greater depressing effect on price than the stimulating effect of the same volume of purchases (R. 1015).

The judgment of the court here discussed would give du Pont great latitude in effecting divestiture. Such a judgment should, on the other hand, require du Pont to make at the end of every year a comprehensive and detailed report concerning the carrying out of the required divestiture, showing, among other things, the number of shares divested by each divestiture means employed; the net proceeds per share from sales to General Motors from each negotiated sale, from each sale through underwriters, and from sales through brokers; the use made of proceeds of sale, for purchase and retirement of stock, or other uses. The judgment should provide for

filing the report with the court and furnishing copies to the Attorney General, and for attaching to it copies of all du Pont offers or agreements relating to divestiture. The Attorney General should be empowered to request additional information, subject to du Pont's right to ask the court to strike down any request upon a showing that it was unduly burdensome or otherwise unwarranted.

Finally, we note that there is ample precedent for a judgment of divestiture which permits the defendant to choose how it shall be achieved. In *Northern Securities Co.* v. *United States*, 193 U.S. 197, and *Standard Oil Co.* v. *United States*, 221 U.S. 1, this Court affirmed judgments which merely barred voting, or receiving dividends on the stock illegally acquired. *Northern Securities Co.* v. *United States*, 193 U.S. 197, 355–356; *Standard Oil Co.* v. *United States*, 221 U.S. 1.[60] Divestiture was thereby compelled, but the defendants were left free to determine how it should be effectuated. Thus, a provision in the *Northern Securities* judgment stating that it did not prohibit Northern Securities from retransferring to Great Northern and Northern Pacific stockholders the respective railroad shares which they had exchanged for Northern Securities stock was later held not to be a "command" to make such return. *Harriman* v. *Northern Securities Co.*, 197 U.S. 244 at 290. This Court approved the lower court's in-

[60] For the *Standard Oil* judgment, see *Decrees and Judgments in Civil Federal Anti-Trust Cases* 127–134. This Court eliminated as unnecessarily drastic a further prohibition against engaging in interstate commerce prior to termination of the illegal combination. 221 U.S. at 81.

terpretation that this provision was "purely permissive", that it did not "exclude other methods of disposition", and that the theory of the judgment was that the method of making the required divestment "could be safely left to" Northern Securities. *Ibid.*

The judgment entered on remand following this Court's decision in *United States* v. *American Tobacco Co.*, 221 U.S. 106, gave American Tobacco choice as to methods of divestiture of certain securities. It provided that American Tobacco "sell or otherwise dispose of, or distribute by way of dividends to its common stockholders * * * all its holdings of the following securities." *Decrees and Judgments in Civil Federal Anti-Trust Cases* 163, 174.

IV

SUGGESTED DIRECTIONS TO THE DISTRICT COURT

If this Court concludes that a judgment should be entered providing for divestiture of du Pont's General Motors stock, we believe it would be appropriate for the Court to give the district court certain directions designed to assure prompt entry of such a judgment. In the proceedings on the prior remand, judgment was not entered until 28 months after receipt of this Court's judgment of reversal. Furthermore, in these proceedings du Pont was not required to make known its views, in the event divestiture were to be decreed, as to how that result could, from du Pont's standpoint, be most advantageously achieved.

In order to bring this already protracted litigation to a conclusion, and to overcome what appears to have

been some misorientation of the prior relief proceedings, we suggest that this Court direct the district court to do the following: (1) Enter an order enjoining du Pont, if divestiture has not been commenced pursuant to a plan approved by the court within one year after this Court's judgment is filed with the district court, from thereafter voting or receiving dividends on any of its General Motors stock, such injunction to terminate on entry of a judgment of divestiture. (2) Appoint a trustee to receive and hold all dividends withheld from du Pont by reason of the foregoing injunctive provisions, and to pay over the money received, less cost of the trusteeship, as directed by the court's divestiture judgment. (3) Enter an order requiring du Pont to file, within 60 days after the district court receives the cause on remand, a proposed judgment providing for complete divestiture of its General Motors stock, and requiring the United States to file, within 30 days after service upon it of du Pont's proposed judgment, either proposed specific amendments to such judgment or a proposed alternate judgment of divestiture.[61]

We submit that there is ample precedent for the foregoing suggested directions. In a series of early decisions involving stock acquisitions held to violate the Sherman Act, this Court and various district

[61] In *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass.), affirmed *per curiam*, 347 U.S. 521, the judgment entered by the district court, based on its holding that appropriate relief necessitated a divestment by the defendant of its business of manufacturing and distributing certain supplies, required it to submit within nine months after the judgment became final "a plan for disposing of" such business. 110 F. Supp. at 353.

courts immediately deprived the offender of all privileges attaching to stock ownership, and thereby compelled it, in its own self-interest, to formulate and submit a plan for effective divestiture. *Northern Securities Co.* v. *United States,* 193 U.S. 197, established the relief which became standard in this situation. The district court, having determined that a holding company's acquisition of the controlling stock of two competing railroads was illegal, entered a judgment which enjoined it from voting such stock and enjoined payment to it of dividends thereon, and this Court affirmed. 193 U.S. at 355. In *United States* v. *Union Pacific R.R. Co.,* 226 U.S. 61, 96–97, this Court, having held that Union Pacific had illegally acquired a majority of the stock of Southern Pacific, directed entry of a decree prohibiting both the voting of this stock and payment of dividends thereon (except to a receiver to be appointed to collect and hold such dividends until disposed of by judgment of the court). In *United States* v. *Reading Co.,* 226 U.S. 324, 373, this Court affirmed the same relief—barring voting and receipt of dividends—as to the stock of Temple Iron Co. held to have been illegally acquired.[62] This was also the relief ordered, and affirmed by this Court, in a second proceeding against the Reading Company.[63] To the same effect, see the judgment entered

[62] *Decrees and Judgments in Civil Federal Anti-Trust Cases* 149, 150–152.

[63] *Id.* 582, 601, 602; *United States* v. *Reading Co.,* 253 U.S. 26, 63. The judgment also provided that if the defendants failed to submit a divestiture plan within 90 days, or if the court should reject the submitted plan, it would then take such further steps, "by receivership or otherwise", as might be necessary to achieve divestiture.

on remand following this Court's decision in *United States* v. *Lehigh Valley R.R. Co.*, 254 U.S. 255.[64] In *Standard Oil Co.* v. *United States*, 221 U.S. 1, 79–82, this Court affirmed the district court's prohibition against voting or paying dividends on the stock of corporations illegally acquired, but directed elimination of the prohibition against engaging in interstate commerce until effectuation of divestiture.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be reversed, with directions to determine, in conformity with the opinion of this Court, the relief which is necessary and appropriate; that the Court's opinion should give the district court directions of the kind suggested under Point IV of this brief; and that the Court's opinion should approve Sections IV to X, inclusive, of the judgment entered on November 17, 1959, as appropriate prohibitions or commands to remain in effect pending entry of final judgment on the second remand to the district court.

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[64] *Decrees and Judgments in Civil Federal Anti-Trust Cases* 687, 690.

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